92-1788

Case No.

Supreme Court, U.S.
FILED
MAY 10 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

1992 - 1993 TERM

IVAN C. REEDER,

Plaintiff/Appellant,

vs.

MARVIN T. RUNYON, POSTMASTER GENERAL
OF THE UNITED STATES,

Defendant/Appellee.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

David J. Holdsworth (4052)
Counsel of Record for Ivan C. Reeder,
Appellant
ROMNEY & CONDIE
185 South State Street, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 321-7800

A. QUESTIONS PRESENTED FOR REVIEW

1. To what extent must an impairment limit a major life activity to be considered substantially limiting?

2. In a case where the parties agree that the plaintiff has an impairment but disagree as to whether such impairment is substantially limiting and whether the plaintiff had a record of such an impairment and whether the plaintiff is regarded as having such an impairment, what must a plaintiff who alleges his impairment is substantially limiting do to defeat a motion for summary judgment?

a. Does a plaintiff who has a speech impairment eliminate all genuine issues of material fact as to whether his impairment substantially limits the major life activities of speaking and working by speaking in a deposition?

b. Must a person who alleges his impairment is substantially limiting fill out any government form declaring himself as disabled to be entitled to protection under the Rehabilitation Act?

c. Does a person who gives uncontroverted deposition testimony and discovery responses as to his lengthy history of seeking medical treatment for his impairment raise a factual issue as to whether he has a record of such an impairment, or must such person obtain and provide all records of his medical treatment, hospitalization, surgeries and therapy in order to demonstrate that he has a record of an impairment so as to withstand a motion for summary judgment?

d. Does a person who puts forth evidence that he was considered for an advancement but not chosen because of concerns about how his speech impairment would affect his ability to perform in the advancement position raise a factual issue as to whether he is regarded as having a handicap?

e. Should the rule announced in Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986), (that an employer does not regard a person as handicapped by determining that he is incapable of satisfying the requirements

of a particular job) be applied to a situation involving the denial of an advancement?

3. Does § 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §794, provide a private cause of action for federal employees alleging discrimination on the basis of handicap?

4. Should the Supreme Court resolve the conflict between the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 11th Circuits, which have held that § 504 of the Act does provide a private cause of action for federal employees alleging discrimination on the basis of handicap, and the 10th Circuit, which has held to the contrary?

B. LIST OF PARTIES

Names of all parties appear in the caption of the case.

C. TABLE OF CONTENTS

	Page
A. QUESTIONS PRESENTED FOR REVIEW . .	1
B. LIST OF PARTIES	3
C. TABLE OF CONTENTS	4
TABLE OF AUTHORITIES	6
D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS . .	11
E. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED	11
F. THE STATUTES AND REGULATIONS INVOLVED IN THE CASE	11
G. CONCISE STATEMENT OF THE CASE . . .	14
NATURE OF THE CASE	14
COURSE OF PROCEEDINGS IN THE COURTS BELOW	15
STATEMENT OF THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED	16
H. (INAPPLICABLE)	21
I. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE	21
J. DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	22
1. TO WHAT EXTENT MUST AN IMPAIRMENT LIMIT A MAJOR LIFE ACTIVITY TO BE CONSIDERED SUBSTANTIALLY LIMITING? . . .	23
2. IN A CASE WHERE THE PARTIES AGREE THAT THE PLAINTIFF HAS AN IMPAIRMENT BUT DISAGREE AS TO WHETHER SUCH IMPAIRMENT IS SUBSTANTIALLY LIMITING AND WHETHER THE PLAINTIFF HAD A RECORD OF SUCH AN IMPAIRMENT AND WHETHER THE PLAINTIFF IS	

REGARDED AS HAVING SUCH AN IMPAIRMENT, WHAT MUST A PLAINTIFF WHO ALLEGES HIS IMPAIRMENT IS SUBSTANTIALLY LIMITING DO TO DEFEAT A MOTION FOR SUMMARY JUDGMENT? 29
A. WHETHER AN IMPAIRMENT IS SUBSTANTIALLY LIMITING IS A QUESTION OF FACT. . 29
B. ON A SUMMARY JUDGMENT, A TRIAL COURT IS TO DETERMINE IF GENUINE ISSUES OF MATERIAL FACT EXIST, THE TRIAL COURT IS NOT TO RESOLVE FACTUAL DIFFERENCES . . 31
C. THE TRIAL COURT'S EFFORT TO RESOLVE FACTUAL DISPUTES AS TO WHETHER REEDER'S IMPAIRMENT WAS SUBSTANTIALLY LIMITING WAS ERRONEOUS 40
(1) THE MATTER OF THE DEPOSITION 43
(2) THE ISSUE OF IDENTIFICATION . . 45
(3) THE ISSUE OF THE MEDICAL RECORDS . . 46
(4) THE ISSUE OF BEING REGARDED AS HAVING AN IMPAIRMENT . . . 50
3. §504 DOES PROVIDE A PRIVATE RIGHT OF ACTION 56
4. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUITS AS TO THE VIABILITY OF A CLAIM UNDER § 504 AND HOLD THAT BOTH SECTIONS PROVIDE PRIVATE CAUSES OF ACTION . . 59

D. CONCLUSION 66

CERTIFICATE OF SERVICE

APPENDIX

TABLE OF AUTHORITIES

Page

Cases:

Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 720-721 and note 20, 83 L.Ed 2d 661 (1985) 58

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 250, 106 S.Ct. 2505, 2511, 91 L.Ed 2d 202, 212, 213 (1986) 31

Bey v. Bolger, 540 F.Supp. 910, 927 . . 49

Blackwell v. U.S. Dept. of the Treasury, 44 FEP 1856 (1987) 45

Boyd v. U.S.P.S., 752 F.2d 410, 413 (9th Cir. 1985) 59-61

Byrne v. Board of Education, 979 F.2d 560, 564 (7th Cir. 1992) . . 25, 26, 29, 55, 56

Carter v. Casa Central, 849 F.2d 1048 (1988) 57

Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987) 58

Carty v. Carlin, 39 FEP 1217 at 1220, 623 F.Supp. 1181, 1185 (D. Md. 1985) . . . 37

Celotex Corp. v. Catrett, 447 U.S. 317 at 322, 106 S.Ct. 2548 at 2552, 91 L.Ed 265 at 273 (1986) 66

Chevron Corp. v. Redmon, 745 S.W.2d 314 (Tex. 1987) 36

Coleman v. Darden, 595 F.2d 533, (10th Cir. 1979), cert. denied, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed 2d 184 (1979) 58

Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 104 S.Ct. 1248, 1253-55, 79 L.Ed 2d 568 (1984) 58

Cortez v. Board of Governors, 766 F.Supp. 623 (N.D. Ill. 1991) 66

Daubert v. U.S.P.S., 733 F.2d 1367, 1371-72 (1984) 63

Davis v. Frank, 711 F.Supp. 447 (N.D. Ill. 1989) 52, 58, 65

de la Torres v. Bolger, 781 F.2d 1134, 1138 (5th Cir. 1986) 34

Dexter v. Tisch, 660 F.Supp. 1418 (D.Conn. 1987) 58

DiPompo v. West Point Military Academy, 708 F.Supp. 540 (S.D.N.Y. 1989) 63

Doe v. New York University, 666 F.2d 761 (2nd Cir. 1981) 28, 57

E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088, 1099, 1100, 1102 (D.C. Hawaii 1980) 26

Elstner v. Southwestern Bell Telephone Co., (bench trial) 659 F. Supp. 1328 (S.D. Tex. 1987), aff'd., 863 F.Supp. 881 (5th Cir. 1988) 36, 51

Florence v. Frank, 774 F.Supp. 1054 (N.D. Tex. 1991) at 1059 32

Forrisi v. Bowen, 794 F.2d 931, 934-935 (4th Cir. 1986) 28, 35, 50, 53, 54

Franklin v. U.S.P.S., 687 F.Supp. 1214 (S.D. Ohio 1988) 58

Fuqua v. Unisys Corp., 716 F. Supp 1201 (D. Minn. 1989) 37

Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985) 57

Gilbert v. Frank, 949 F.2d 637 (2nd Cir. 1991) 24, 29

Hall v. U.S.P.S., 857 F.2d 1073 (6th Cir. 1988) 58

Jasany v. U.S.P.S., 755 F.2d 1244, 1250 (6th Cir. 1985) 34

Johnson v. Minnesota Historical Society, 931 F.2d 1239 (8th Cir. 1991) 33

Johnson v. Sullivan, 764 F.Supp. 1053 (D. Md. 1991) 58

Johnson v. United States Postal Service, 861 F.2d 1475 (10th Cir. 1988), cert. denied, 493 U.S. 811, 110 S.Ct. 54, 107 L.Ed.2d 23 (1989) 56, 57, 59, 60, 64

Leckelt v. Board of Comrs. of Hosp. Dist. No. 1, 909 F.2d 820, 825 (5th Cir. 1990) . 56

Longoria v. Harris, 554 F.Supp. 102 (S.D. Texas 1982) 58

Mahoney v. Ortiz, 645 F.Supp. 22 (S.D. N.Y. 1986) 49

McGuinness v. U.S.P.S., 744 F.2d 1318, 1321 (7th Cir. 1984) 59, 60, 62

Milbert v. Koop, 830 F.2d 354, 357, 44 FEP 1694 (D.C. Cir. 1987) 58

Miller v. AT&T Network Systems, 722 F.Supp. 633 (D. Or. 1989) 51

Morgan v. United States Postal Service, 798 F.2d 1162, 1165-66 (8th Cir. 1986), cert. denied, 480 U.S. 948 1075 S.Ct. 1608, 94 L.Ed 2d 794 (1987) 57, 64

N.A.A.C.P. v. Medical Center, Inc., 599 F.2d 1247 (1979) 57

Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368 (3rd Cir. 1991) . . . 33, 56

Oesterling v. Walters, 760 F.2d 859, 861 (8th Cir. 1985) 36

Perez v. Philadelphia Housing Authority, 677 F.Supp. 357 (ED Pa. 1987) 39

Prewitt v. United States Postal Service, 662 F.2d 292, 304 (1981) 57, 59, 62-64

Pridemore v. Legal Aid Society of Dayton, 625 F.Supp. 1171, 1175 (S.D. Ohio 1985) 36, 38

Pushkin v. Regents of University of Colorado, 658 F.2d 1372 63

School Board of Nassau County, Fla. v. Arline, 480 U.S. 273, 277-280, 94 L.Ed.2d 307, 107 S.Ct. 1123 (1987) 24, 28, 39, 54, 58

Shirey v. Devine, 670 F.2d 1188, 1201 (D.C. Cir. 1982) 65

Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990) 66

Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed 2d 746 (1984) 58

Smith v. United States Postal Service, 742 F.2d 257, 259-60 (1984) 57, 64

Southeastern Community College v. Davis, 574 F.2d 1158 (1978) reversed on other grounds, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed 2d 980 (1979) 57, 58, 63, 64

Stevens v. Stubbs, 33 FEP Cases 1249 (1983) 36

Strathie v. Department of Transportation, 716 F.2d 227, 230 (1983) 57

Taylor v. United States Postal Service, 57 EPD ¶41,046, 68, 618, 946 F.2d 1214, 1217 (6th Cir. 1991) 53, 55

Treadwell v. Alexander, 707 F.2d 473 (1983) 57

Tudyman v. United Airlines, 608 F.Supp. 739, 745 (C.D. Cal. 1984) 36

United States v. Borden Co., 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939) 62

Vickers v. Veterans Administration, 549 F.Supp. 85 (W.D. Wash. 1982) 58

Williams v. Frank, 757 F.Supp. 112 (D. Mass. 1991) 32

Wright v. Tisch, 45 FEP 151, 152 (ED Va. 1987) 35

D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

As far as Plaintiff is aware, the district court and court of appeals decisions are unreported. Both decisions are reproduced in the appendix.

E. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

(i) Date of Decision of U.S. Court of Appeals for the Tenth Circuit sought to be reviewed: February 9, 1993.

(ii) None.

(iii) Inapplicable.

(iv) The statutory provision believed to confer on this Court jurisdiction to review the decree by writ of certiorari is 28 U.S.C. § 1254(1).

F. THE STATUTES AND REGULATIONS INVOLVED IN THE CASE.

29 U.S.C. §791(b):

> Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after

September 26, 1973, submit to the Office of Personnel Management and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Office, if the Office determines, after consultation with the committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement and advancement opportunities for handicapped individuals.

29 U.S.C. §794:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate

authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. §706(8)(B):

... the term "individual with handicaps" means ... any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 C.F.R. §1613.702:

(d) "Has a record of such an impairment" means <u>has a history of</u>, or has been classified (or misclassified) as having a mental or physical impairment that substantially limit major life activities.

(e) "Is regarded as having such an impairment" means (1) has a physical or mental impairment that does not substantially limit major life activities <u>but is treated by an employer as constituting such a limitation</u>; (2) has a physical or mental impairment that substantially limits major life activities only as a <u>result of the attitude of an employer toward such impairment</u>; (3) or has none of the impairments defined in (b) of this section but is <u>treated by an employer</u> as having such an impairment.

29 C.F.R. § 1613.703:

> Agencies shall give full consideration to the hiring, placement and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

29 C.F.R. §32.3:

> (2) Substantially limits means the degree that the impairment... affects an individual's employability. A handicapped individual who is likely to experience difficulty in securing, or retaining, or advancing in employment would be considered substantially limited.

39 U.S.C. §1003(b):

> The Postal Service shall follow an employment policy designed ... to extend opportunity to the disadvantaged and the handicapped.
>
> (emphasis added)

G. CONCISE STATEMENT OF THE CASE

NATURE OF THE CASE

Plaintiff Ivan Reeder is an employee of the United States Postal Service. He has a speech impairment which substantially limits his ability to speak and therefore communicate, interact and work. He applied for an advancement in 1989 and again in 1990.

Despite abundant qualifications for the two advancements at issue, he was not selected for either advancement. He was not selected because management believed that with his speech impairment he would not be able to do the job.

Reeder filed the instant action alleging the Postal Service's decision not to award him either of the advancements at issue constituted a violation of the Vocational Rehabilitation Act of 1973, specifically 29 U.S.C. §791 and §794 (§501 and §504 thereof). Reeder alleged the Postal Service's actions violated the affirmative action obligations set forth in §501 of the Act and violated the prohibition against intentional discrimination on the basis of handicap set forth in §504 of the Act.

COURSE OF PROCEEDINGS IN THE COURTS BELOW

The Postal Service filed a Motion for Summary Judgment on the sole ground that no issue of fact existed that Reeder's impairment did not constitute a substantial limitation to a major life activity and

therefore that Reeder was not entitled to the Act's protections.

U.S. District Judge David Sam, without a hearing, decided that Reeder had not raised a genuine issue of material fact as to whether his impairment was substantially limiting or whether he had a history of such an impairment or whether he was regarded as having an impairment and granted the Postal Service's Motion for Summary Judgment in its entirety. See the trial court's Memorandum Decision included in the Appendix hereto.

The U.S. Court of Appeals for the Tenth Circuit, without oral argument, and "for substantially the reasons given by the district court," affirmed the district court's conclusion that Reeder did not raise a genuine issue of material fact under any of the three tests of the Rehabilitation Act. See the Court of Appeals' Order and Judgment included in the Appendix hereto.

STATEMENT OF THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

1. Plaintiff has been employed continuously with the Postal Service since 1973.

2. Reeder progressed in employment until 1981. Reeder has served in the position of Maintenance Control Supervisor, EAS-14, since 1981 without any advancement.

3. Reeder has a speech impairment. In his complaint, deposition and in his responses to written discovery requests, Reeder explained that he has, over the past twenty five years, visited several physicians, one or more of whom has told him that his condition could be labeled "aphasia". His condition is more accurately described as "spastic dysphonia" or "spasmodic dysphonia." It is caused by abnormality or malfunctioning of the vocal cords and speech mechanism. For the assistance of the court, counsel attaches a brief written explanation of spasmodic dysphonia, written by medical professionals at the Dystonia Clinical Research Center, Columbia-Presbyterian Hospital, New York City.

4. Reeder's impairment affects his ability to vocalize understandable speech. He must make a concerted effort to manipulate his vocal organs. Sometimes he must speak softly or loudly or slowly to make himself understandable. People must listen to him very carefully and concentrate in order to understand him. People with whom he interacts often have trouble hearing or understanding him. Reeder stated that people have difficulty understanding him 90% of the time.

5. On or about April 13, 1989, Plaintiff applied for a promotion/advancement to the position of Maintenance Programs Specialist, EAS-19. He was not awarded the promotion/advancement.

6. On or about June 8, 1990, he again applied for the same position and was again not awarded the promotion/advancement.

7. On February 5, 1991, the Postal Service deposed Plaintiff. The deposition took place in a quiet room with no background noise. Reeder made a special effort to speak intelligibly and he believes the reporter and

Defendant's counsel made a special effort to understand him. Reeder testified that he himself has made compensatory changes in his efforts to communicate and has taught his staff to make changes to adjust to his speech. Reeder testified that "at work it occurs every day that they ... they have difficulty understanding." Reeder testified that when its just day to day "it is more difficult to understand him." Reeder testified that he has trouble communicating about 90% of the time. Reeder indicated speaking for seven hours would become painful for him.

8. Reeder is not required to fill out any form to declare himself disabled.

9. In his answers to discovery, Reeder compiled a list of physicians whom he had visited over the years for general health concerns and diagnosis and treatment of his speech impediment. That list and his deposition testimony indicated a wide ranging search for treatment and cure for his impairment, consisting of:

a. many visits to physicians; physicians' medical records in the record include these references to his speech condition:

> He has had a problem with his larynx for many years. It is associated with some difficulty with speech. He has had nodules removed from his larynx surgically on two occasions in 1966 and 198[1].
>
> PHYSICAL EXAMINATION
>
> He has some difficulty with speech, which my guess would be, stems from laryngeal spasm. He says this is much more pronounced when he is nervous or fatigued and is much better in the evening, when he is relaxed after he has had several drinks.

b. surgery on two occasions on his vocal cords, once in 1966 and once in 1980 or 1981, the latter of which required six days of hospitalization.

c. a history of taking medication and injections into his voice box over a two year period of time. And other medication and treatment.

d. Reeder, after searching for relief from several doctors and specialists, eventually concluded that current medical

progress couldn't help him any further and so he is waiting for medical research and treatment to develop.

9. In Reeder's affidavit filed with his EEO complaint, Reeder described being denied a detail to the advancement he had later sought but did not receive:

> Ken [the supervisor] said Dennis Dierks [another employee] was just answering the telephones and little stuff to take the burden off Ray Darragh and Les Ashby, Maintenance Program Specialists. And that I was considered but they (Ray Darragh, Sam Ruden, Dan Krizman, and others) decided against me because of my speech.
>
> . . . .
>
> I said, "Wow, I can't believe you are telling me this! That is grounds right there for a discrimination complaint." Ken said that if he were in my shoes and anyone else got the job that he probably would file an EEO complaint. That I had the knowledge, experience and the abilities and would be the best choice for the job.

Reeder testified about this discussion further in his deposition.

H. (INAPPLICABLE)

I. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The U.S. District Court for the District of Utah had original jurisdiction of this case due to a federal question, the interpretation of the federal Vocational Rehabilitation Act of 1973, 29 U.S.C. §§701 et seq., and according to other related statutes: 28 U.S.C. §1331, §1343, §1339, 42 U.S.C. §2000e-5(f)(3) and 39 U.S.C. §409(a).

J. DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case presents this Court with the opportunity to interpret the meaning of the statutory term "individual with handicaps" and in particular the term "substantially limits." The determination of this issue will affect not only cases of federal employment under the Rehabilitation Act of 1973 but in cases of private employment under the Americans with Disabilities Act.[1] This is an important question of federal law which has not been but should be addressed and settled by the Supreme Court.

---

[1]Reeder contends there should be no difference between the terms "individual with handicaps" and "individual with a disability."

1. TO WHAT EXTENT MUST AN IMPAIRMENT LIMIT A MAJOR LIFE ACTIVITY TO BE CONSIDERED SUBSTANTIALLY LIMITING?

INTRODUCTION

This case deals with whether Reeder's impairment is substantially limiting. Everyone agrees that Reeder has an impairment. The parties disagree on whether that impairment is substantially limiting to a major life activity, they disagree on whether Reeder has a record of such an impairment, and they disagree on whether Reeder is regarded as having such an impairment.

To assert a claim of physical handicap discrimination, a plaintiff must first establish that he is handicapped as defined by the statute.

The Rehabilitation Act, 29 U.S.C. § 706(8)(B), defines "individual with handicaps" as any person who

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;
> (ii) has a record of such an impairment, or
> (iii) is regarded as having such an impairment.

The statute defines a person with a handicap as a person who has an impairment which is substantially limiting to one or more of life's major activities. The impairment which substantially limits one or more major life activities may be a current impairment, it may be a past impairment or it may even be a nonexistent impairment, if the person is nevertheless regarded as having such an impairment. School Board of Nassau County, Fla. v. Arline, 480 U.S. 273, 277-280, 94 L.Ed.2d 307, 107 S.Ct. 1123 (1987). See Gilbert v. Frank, 949 F.2d 637, 640-641 (2nd Cir. 1991).

The regulations define the term "physical impairment" as including the speech organs and "major life activities" as including "speaking" but do not define the term "substantially limits." See 29 C.F.R. § 1613.702(b) and (c).

Neither the Rehabilitation Act nor the regulations answer the question of the degree to which an impairment must limit an individual's major life activities to qualify as a substantial limit and to qualify a

person as an individual with handicaps. Of some guidance is 29 C.F.R. §32.3 which states:

> A handicapped individual who is likely to experience difficulty in ... advancing in employment would be considered substantially limited.

Clearly, the limit must be more than de minimis, but, just as clearly, the limit need not be of such a magnitude as to totally limit or eliminate a major life activity. The limit must be a significant limit. See Byrne v. Board of Education, 979 F.2d 560, 564 (7th Cir. 1992).

Most Rehabilitation Act cases have not dealt with the issue of what is meant by "substantially limits." Most Rehabilitation Act cases have dealt with issues beyond the threshold question, such as whether a handicapped person is otherwise qualified, what the essential functions of a job are, or what the concepts of reasonable accommodation or undue burden entail.

As the Seventh Circuit has noted:

> Few cases have spent time on the question of who is a "handicapped individual", because the issue

> usually requires little analysis ... [Some courts] have found that the condition at issue may not even be an impairment ... [other] courts assume, without deciding, that a person's condition constitutes a handicap because it is clear that he or she failed to fulfill the required showing of the other elements.

Byrne, 979 F.2d at 564.

One of the earliest and still the landmark case on the issue of what the term "substantially limits" means is E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088, 1099, 1100, 1102 (D.C. Hawaii 1980). In Black, the district court determined that the Congress intended at least two policies by choosing the words it used to define "individual with handicaps": (1) that the Act and regulations promulgated under it were to be interpreted broadly, not construed in a niggardly fashion, and (2) that the determination of whether an individual is handicapped be made on a case by case basis with individualized inquiry. Thus, the court determined that whether an impairment "substantially limited" a major life activity should be decided by looking at the interplay between the human

being, the impairment and the job being sought.

> The definitions contained in the Act are personal and must be evaluated by looking at the particular individual. A handicapped individual is one who "has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment ..." (emphasis added). It is the impaired individual that must be examined, and not just the impairment in the abstract.
>
> . . . .
>
> The Court believes that the real focus must be on the individual job seeker, and not solely on the impairment or the perceived impairment. This necessitates a case-by-case determination of whether the impairment or perceived impairment of a rejected, qualified job seeker, constitutes, for that individual, a substantial handicap to employment. . . .
>
> . . . .
>
> Yet, the Court believes that Congress intended the coverage of the Act to be broad in scope and intended that questions as to that coverage be answered on a case-by-case basis. Both of these intentions would be defeated if the coverage of the Act were reduced because of narrow definitions of "substantially limits" and "substantial handicap to employment."[2] (emphasis added)

---

[2]The E.E. Black approach is expressly incorporated into the Americans with Disabilities Act regulations, Federal Register, July 26, 1991 at 35726.

The E.E. Black decision effectively cut off any attempt to limit the term "impairment" to generally recognized impairments and put the focus where it belonged, namely on the evidence of the particular impairment and how a person's impairment affects the individual in his daily activities.

Other courts have echoed the Black finding that Congress desired the Rehabilitation Act to be broad in scope of coverage. See, for example, Doe v. New York University, 666 F.2d 761, 775 (2nd Cir. 1981); Arline, 480 U.S. 280 n.5, 107 S.Ct. at 1127 n.5.

The primary restriction on a broad reading of "substantially limits" is the rule announced in Forrisi v. Bowen, 794 F.2d 931, 934-935 (4th Cir. 1986), with respect to the third test or "regarded as" test of the Rehabilitation Act:

> Several courts have previously addressed this issue, deciding unanimously that an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of

> a particular job. (citations omitted). The statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved.

This case presents the question of whether the Forrisi rule should apply in a situation involving a person's effort to obtain an advancement.

2. IN A CASE WHERE THE PARTIES AGREE THAT THE PLAINTIFF HAS AN IMPAIRMENT BUT DISAGREE AS TO WHETHER SUCH IMPAIRMENT IS SUBSTANTIALLY LIMITING AND WHETHER THE PLAINTIFF HAD A RECORD OF SUCH AN IMPAIRMENT AND WHETHER THE PLAINTIFF IS REGARDED AS HAVING SUCH AN IMPAIRMENT, WHAT MUST A PLAINTIFF WHO ALLEGES HIS IMPAIRMENT IS SUBSTANTIALLY LIMITING DO TO DEFEAT A MOTION FOR SUMMARY JUDGMENT?

A. WHETHER AN IMPAIRMENT IS SUBSTANTIALLY LIMITING IS A QUESTION OF FACT.

Given the E.E. Black rule mandating an individualized inquiry, whether a person's impairment is substantially limiting is primarily a question of fact. See Gilbert v. Frank, 949 F.2d 637 640-641 (2nd Cir. 1991); Byrne v. Board of Education, 979 F.2d 560, 565-567 (7th Cir. 1992).

As with any fact question, where there is no issue of material fact summary judgment

is proper. Here, there were several issues of material fact in dispute

There is significant dispute as to how Reeder's impairment affects his current ability to interact. There is significant dispute about the history of his impairment. There is significant dispute about whether Postal Service management regarded his impairment as substantially limiting to the positions into which he was seeking to advance.

In this case, there was sufficient evidence in the record as a whole upon which a jury could return a verdict in Reeder's favor on the issue of whether he is handicapped, and the court should not have granted summary judgment. The court was able to do so in this case only by overstepping its bounds on a summary judgment and resolving factual issues that should have been tried.

The district court determined that Reeder's speech disorder was an impairment and acknowledged that his impairment affects a major life activity. Memorandum Decision

at 18-19. The district court also recognized that the dispositive issue was whether Reeder's speech disorder constituted a "substantial impairment" to his ability to speak, interact and work.[3] Memorandum Decision at 20.

The district court erred, however, when it tried to resolve factual disputes as to whether Reeder's impairment substantially limited any of his major life activities and as to whether Reeder had a record of such an impairment and as to whether Reeder was regarded as having such an impairment. Memorandum Decision at 20.

B. ON A SUMMARY JUDGMENT, A TRIAL COURT IS TO DETERMINE IF GENUINE ISSUES OF MATERIAL FACT EXIST, THE TRIAL COURT IS NOT TO RESOLVE FACTUAL DIFFERENCES.

The trial court's duty under FRCP 56 is simply to decide whether there is a factual issue for trial but not to resolve fundamental factual issues. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 250,

---

[3]The trial court framed the dispositive issue as whether Reeder's speech disorder constitutes a "substantial impairment" to his ability to speak. The court probably meant "substantial limitation".

106 S.Ct. 2505, 2511, 91 L.Ed 2d 202, 212, 213 (1986).

In evaluating the evidence, a trial court must restrain itself from making its own judgments about credibility. Williams v. Frank, 757 F.Supp. 112, 115-116 (D. Mass. 1991). See Florence v. Frank, 774 F.Supp. 1054 (N.D. Tex. 1991) at 1059:

> The court does not determine the credibility of the non-movant's evidence, instead, for purposes of the motion, the court assumes that the nonmovant's evidence is believable.

The trial court must view the facts and all inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. The court must determine whether the evidence is such that a reasonable jury could return a verdict for the nonmovant.

Even if the facts are undisputed, if there is a disagreement over what inferences can be reasonably drawn from the facts, summary judgment should not be granted.

Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368 (3rd Cir. 1991).[4]

Only where no reasonable fact finder could conclude that an impairment is substantially limiting, should a court hold that a person has not satisfied the threshold test of being an individual with handicaps.

---

[4]At least one court has cautioned against granting summary judgments too quickly in the employment discrimination context:

> Summary judgments should seldom be used in cases alleging employment discrimination. (citation omitted). The reason is the special category in which Congress and the United States Supreme Court visualized these cases (citation omitted) knowing that discrimination is difficult to prove by direct evidence, employment discrimination cases require a "simplified proof" from a claimant in order to create an inference of discrimination and thereby establish a prima facie case (citation omitted). Summary judgments should be sparingly used and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion. ... All the evidence must point one way and be susceptible of no reasonable inferences sustaining the position of the non-moving party.

Johnson v. Minnesota Historical Society, 931 F.2d 1239 (8th Cir. 1991).

For example, when there is no evidence as to limitation or the parties stipulate as to no limitation, summary judgment may be proper.

In Jasany v. U.S.P.S., 755 F.2d 1244, 1250 (6th Cir. 1985), a postal employee asserted that a mild case of crossed eyes constituted a handicap. In that case:

> ... the parties stipulated that Jasany's condition had never had any effect whatsoever on any of his activities, including his past work history and ability to carry out other duties at the post office apart from operation of the LSM-ZMT. Based upon this stipulation and in light of our analysis of the statutory definition, we find that the District Court erred as a matter of law in finding that the appellant was a handicapped person within the meaning of 29 U.S.C. § 706(7). Consequently, the appellant failed to establish a prima facie case of handicap discrimination. (emphasis added)

The same result was reached in another oft cited case, de la Torres v. Bolger, 781 F.2d 1134, 1138 (5th Cir. 1986). In that case, an employee who was lefthanded argued that lefthandedness constitutes an impairment that was substantially limiting. The Fifth Circuit disagreed:

> Being left handed is a physical characteristic, not a chronic illness, a disorder or deformity, a mental disability, or a condition affecting de la Torres' health. It is not an "impairment" as contemplated by the Act.

See also Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986), (plaintiff had a fear of heights, refused to climb to certain heights and was terminated). Note that, like Jasany, Forrisi testified as to no limitation:

> Forrisi does not maintain that his acrophobia substantially limits his major life activities or that he has a history of an impairment that so limits him. To the contrary, he reported in deposition testimony that "My fear of heights never affected my life at all on any job or anything" and that "It never was a problem before I got this job here at NIEHS. It never was a problem."

Accord Wright v. Tisch, 45 FEP 151, 152 (ED Va. 1987):

> Plaintiff does not maintain that her dust allergy substantially limits her major life activities or that she has a history of any impairment that so limits her. To the contrary, plaintiff has reported in deposition testimony that upon her departure from the CFS, her symptoms went away. She stated that in positions with the Postal Service other than the CFS, her physical health was fine, despite the presence of some dust. She has no difficulty with outdoor

> activity. The position that she specifically sought, that of a letter carrier, calls for lifting packages of up to seventy pounds, a task plaintiff claims she can and has performed. (emphasis added)

The common thread running through all of these cases is that the plaintiffs themselves did not consider themselves substantially limited and either stipulated to no substantial limitation or at trial testified of no substantial limitation, or of no record of such a limit, or of not being regarded as having such a limit.[5]

---

[5] Likewise, see the following non Postal Service cases: Stevens v. Stubbs, 33 FEP Cases 1249 (1983), ("impairment does not encompass transitory illnesses which have no permanent effect on the person's health"), Tudyman v. United Airlines, 608 F.Supp. 739, 745 (C.D. Cal. 1984) (being overweight due to bodybuilding is not an impairment), Oesterling v. Walters, 760 F.2d 859, 861 (8th Cir. 1985) (mild case of varicose veins not a substantial limitation), Pridemore v. Legal Aid Society of Dayton, 625 F.Supp. 1171, 1175 (S.D. Ohio 1985) (a faint case of cerebral palsy not a substantial limitation but history of hospitalization for mental illness could qualify as a handicap).

See also Chevron Corp. v. Redmon, 745 S.W.2d 314 (Tex. 1987) (applicant's minor visual problems did not constitute those severe barriers to employment or other life functions which necessitated protection by the state); Elstner v. Southwestern Bell Telephone Co., (bench trial) 659 F. Supp. 1328 (S.D. Tex. 1987), aff'd., 863 F.Supp.

By contrast, one common thread running through the cases where plaintiffs have raised a fact question as to the substantiality of a limit or established a substantial limit is that the plaintiffs genuinely considered themselves limited or had a medical history of treatment of a limitation or there was some evidence in the record that their employers regarded them as having significant limitations.

See, for example, Carty v. Carlin, 39 FEP 1217 at 1220, 623 F.Supp. 1181, 1185 (D. Md. 1985):

> This case is to be distinguished from Jasany. In that case, the parties stipulated that Jasany's condition had never had any affect whatsoever on any of his activities, including his past work history and ability to carry out other duties apart from operation of the mail sorting machine. Id. at 1250.

---

881 (5th Cir. 1988) (employee with knee injury which didn't interfere with his ability to walk or work other than that he could no longer climb telephone poles not handicapped); Fugua v. Unisys Corp., 716 F. Supp 1201, 1206-1207 (D. Minn. 1989) (plaintiff admitted being able to carry on active lifestyle despite back strain argued to constitute a substantial limitation).

> The record in this case, however, does not disclose any such stipulation nor does the record clearly indicate that the parties are in agreement about the nature and severity of the plaintiff's condition.
>
> Therefore, the Court cannot state, after examining the record in this case in a light most favorable to the plaintiff, that he does not meet the definition of a handicapped person under the law.

In Pridemore v. Legal Aid Society of Dayton, 625 F.Supp. 1171, 1176 (S.D. Ohio 1985), the court did decide that a very mild case of cerebral palsy was not substantially limiting, but held that plaintiff's testimony (in a letter in the record) as to prior hospitalization for mental illness raised a genuine issue of material fact as to whether his mental illness was substantially limiting:

> Drawing all inferences favorable to Plaintiff, as the nonmovant, Plaintiff's hospitalization for depression in 1979 indicates that his mental illness substantially limited a major life activity, that of being able to function and take care for himself. Thus, this passage in Plaintiff's letter to Defendant creates a genuine issue of material fact as to whether, as required by Section 706(7)(B)(ii), Plaintiff

> had a record, at the time of his application to Defendant, of an impairment which substantially limited one or more of his major life activities.

See also Perez v. Philadelphia Housing Authority, 677 F.Supp. 357, 360-361 (ED Pa. 1987) (plaintiff's testimony as to how her back problems affected her ability to sit, stand, drive and work established a substantial limitation).

One of the most recent holdings of the U.S. Supreme Court in this area, School Board of Nassau County v. Arline, 480 U.S. 273, 281, 107 S.Ct. 1123, 1127 (1987), held evidence of hospitalization for a contagious disease sufficient to satisfy the test of having a record of an impairment serious enough to be a substantially limiting impairment:

> [W]e must consider whether Arline can be considered a handicapped individual ... This impairment [tuberculosis] was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of impairment" within

the meaning of 29 U.S.C. § 706(7)(B)(ii).

(Plaintiff notes that hospitalization is not the test, but merely an evidence of the severity of an impairment. A person might never be hospitalized, yet have a substantially limiting impairment. A person may be hospitalized for an impairment yet not have a substantially limiting impairment. The focus should not be on medical treatment itself but on the impact medical treatment has on the individual's daily activities.)

C. THE TRIAL COURT'S EFFORT TO RESOLVE FACTUAL DISPUTES AS TO WHETHER REEDER'S IMPAIRMENT WAS SUBSTANTIALLY LIMITING WAS ERRONEOUS.

The record presented several disputed issues of fact.

1. Reeder presented answers in written discovery and in his deposition to the government's questions as to the effect of the impairment on Reeder's ability to communicate. He gave detailed recollections as to his life with the disorder and his multi-year search for medical relief. He made statements as to how the Postal Service

perceives his speech condition as being substantially limiting on his ability to advance. The government sought to attack Reeder's credibility and otherwise disprove his testimony.

2. The parties did present some medical records in which a Dr. Aldrich (whom Reeder visited after Reeder had given up actively seeking treatment) identifies Reeder's impairment, gives it a name, and confirms Reeder's past efforts to obtain treatment. The government sought to minimize such records.

3. In Reeder's administrative complaint affidavit and in his deposition, Reeder testified as to his discussions with Ken McArthur (his supervisor) regarding why he was not selected for a detail (a temporary assignment) and the inference in the affidavit and deposition as to the close connection between the detail and the advancement (same duties, pre-selection) and the barrier management's "regarding him" as handicapped was having on his ability to advance.

The government presented an affidavit (declaration) by Ken McArthur admitting Reeder was denied the detail in part due to a concern expressed by some manager as to Reeder's speech. (This also raises the issue of whether mixed motive analysis applies in Rehabilitation Act cases.)

4. Inferences from the record, as a whole, such as why, with Reeder's acknowledged accomplishments and qualifications, he has not been able to advance since 1981 - and could it be due to management's concern that people would react negatively to his disorder?

Given these disputes about the extent to which Reeder's impairment was substantially limiting, the trial court should have recognized a genuine issue of fact, or at least held an evidentiary hearing on the issue of the substantiality of Reeder's impairment. Instead, the trial court, without any hearing, drew inferences against Reeder and otherwise tried to resolve these factual disputes. The Court of Appeals affirmed that approach.

Upon closer review, however, the error of such an approach becomes obvious. It is a clear departure from the accepted or usual course by which these disputes should be resolved.

(1) THE MATTER OF THE DEPOSITION

Reeder testified in his deposition that he had an impairment that was for him a substantial limitation in his ability to communicate with others.

The Postal Service tried to call Reeder's credibility into question by arguing, among other things, that he could speak well enough to give a deposition, and that he had not identified himself as disabled, and that therefore he could not truly deem his impairment as substantial. Under the summary judgment standards discussed above, the trial court should not have tried to resolve the factual disputes inherent in Reeder's evidence and the government's efforts to discredit the same, but granted a trial.

Instead of recognizing that the content of Reeder's deposition created a factual

issue as to his ability to communicate in the workplace, the district court tried to resolve this factual dispute. The court determined, not on the basis of the content of Reeder's deposition, but on the mere fact that Reeder had been able to speak in a deposition (or that the transcript thereof was intelligible) that Reeder's impairment could not be substantially limiting. See Memorandum Decision at 20. This was error.

The trial court judged Reeder's ability to speak as viewed through the eyes of the lawyer taking the deposition. Defendant's counsel in essence "testified" that Reeder spoke "intelligibly" to him. The Court made its mind up on the basis of an interested person's characterization of that experience outside of the workplace.

The court should have considered the content of Reeder's deposition--Reeder's own testimony in the transcript itself as to how his impairment limits his ability to speak, interrelate and work was uncontroverted. (90% of the time Reeder has difficulty getting people to understand him). Reeder's

ability to answer questions in a deposition does not eliminate a fact question as to whether his speech impairment is significant limitation on his ability to communicate on the job and otherwise.

(2) THE ISSUE OF IDENTIFICATION

Reeder testified in his deposition that he saw no need to fill out any form identifying him as disabled and that there was no requirement that he do so to be protected under the Act.

The Postal Service argued that because Reeder never officially declared on any form that he had a speech disorder when he applied for employment with the Postal Service in 1973 or thereafter, Reeder must not consider his impairment substantially limiting. The trial court accepted the government's argument. This was error.

Such self-identification is not necessary to trigger protection of the Rehabilitation Act, at least where the impairment is obvious. See Blackwell v. U.S. Dept. of the Treasury, 44 FEP 1856 (1987) (as part of plaintiff's prima facie case,

employee must show that a reasonable interviewer would or should have known or been aware of the applicant's handicap). A person's failure to fill out any form declaring himself as disabled should not preclude him from raising a genuine issue of fact as to whether his impairment substantially limits a major life activity.

The purpose of self-identification is presumably to alert the employer. Reeder's condition, being speech related, would have disclosed itself the moment he began to speak. The Postal Service offered no testimony that it was not aware of Reeder's impairment. Indeed, the evidence was that the Postal Service was very aware of it and considered it a deficit to his career. Such surely raised a genuine issue of fact. See Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1381-1383 (3rd Cir. 1991) ("We believe there is a disputed issue of material fact whether MCP knew or reasonably should have known that Nathanson met the standards for a handicapped individual under the Act").

(3) THE ISSUE OF THE MEDICAL RECORDS

Reeder testified at length about his search for a cure for his impairment. The Postal Service tried to question Reeder's credibility by, in effect, requiring Reeder to produce all 25 years of medical records relating to the treatment of his impairment.

Instead of recognizing that Reeder's testimony and discovery responses and the Postal Service's efforts to attack his credibility created a genuine issue of material fact as to whether Reeder had a history of a substantially limiting impairment, the trial court tried to resolve the factual dispute:

> Although Reeder produced a lengthy list of the doctors and other professionals he visited, Reeder is unable to corroborate such visits with medical records or other evidence. (Memorandum Decision at 21).

This was a fundamental error on the part of the trial court. No one controverted Reeder's testimony. And the record did contain one medical record which referred to Reeder's impairment twice. But the trial court required Reeder to corroborate his own uncontroverted and detailed testimony with

additional medical records. A person should not have to obtain all records of his medical treatment, hospitalization, surgeries and therapy to prevail on a summary judgment, especially where his testimony is uncontroverted.

The district court confused the concept of "having a record of such an impairment" with producing all medical records of the treatment of such an impairment. This was error. The regulations, 29 C.F.R. 1613.702(d), equate "record of" with "history of ... having an impairment that substantially limits major life activities." Reeder's evidence, being uncontroverted, certainly establishes that he had history of an impairment that has required years of searching for relief and cure.

Reeder's testimony was specific, detailed and logical. Reeder described in detail the various medical treatments of his impairment. Reeder testified he had surgery on his vocal cords in the early 1970's and that in the early 1980's he had surgery again which put him in the hospital for six days.

In the early 1980's he received, over a 2 year period, treatments consisting of injections of a variant of the botulism toxin into his voicebox. He has taken medication which helps relax his vocal cords and been to various specialists. He testified that he eventually gave up seeking a cure. Such evidence and all reasonable inferences to be drawn therefrom clearly establish he had a rare and difficult to analyze impairment which had necessitated extensive medical testing and treatment, including hospital stays. See Bey v. Bolger, 540 F.Supp. 910, 927, (history of cardiovascular disease); Mahoney v. Ortiz, 645 F.Supp. 22, 24 (S.D. N.Y. 1986) (individual with history of shoulder dislocations was a handicapped person under the Rehabilitation Act).

The Postal Service sought to attack the credibility of Reeder, but if such attacks did raise questions of credibility, those questions should not have been resolved by the trial court on a summary judgment.

At trial, Reeder may have the burden of producing more than uncontradicted deposition

testimony and answers to interrogatories but based on the evidence in the record on summary judgment, a reasonable fact finder could certainly conclude that Reeder was not just making up his story but that his uncontradicted testimony and his detailed recollections and reconstructions of doctors and medical visitations and the notes in Dr. Aldrich's medical records were sufficient to raise a genuine issue as to whether he had a history of a substantially limiting impairment.

(4) THE ISSUE OF BEING REGARDED AS HAVING AN IMPAIRMENT

The evidence in the record indicated that management denied Reeder assignment to a detail to the position he soon thereafter sought on a permanent basis because management thought his speech disorder would make it difficult for him to perform the functions of the job, such as heavy telephone use, public speaking, etc.

The trial court resolved the legal issue inherent in those facts by using the analysis of Forrisi v. Bowen, 794 F.2d 931 (4th Cir.

1986), that one particular employee's impairment cannot be substantially limiting to a major life activity if it simply prevents that employee from performing one particular job. Accordingly, the court held that Reeder's contentions, even if true, did not establish a "regarded as" claim:

> Reeder was denied the telecommunications detail in part because it required heavy use of the telephone. However, this does not demonstrate that the Postal Service regarded Reeder as having a handicap. The telecommunications detail was merely one employment position. The Postal Service's refusal to grant Reeder this detail does not suggest that he would be precluded, generally, from the type of employment in which he is currently engaged, or for which he has received his training. (Memorandum Decision at 25)

See also Elstner v. Southwestern Bell Tel. Co., 659 F.Supp. 1328 (S.D. Tex. 1987). See also Miller v. AT&T Network Systems, 722 F.Supp. 633 (D. Or. 1989). This was error.

The trial court's mistake was in its application of the Forrisi rule to a case involving an advancement.

This case presents the conflict between Forrisi and congressional policy of

emphasizing that barriers to the ability of handicapped persons to advance in employment should be broken down. See 29 U.S.C. § 791 "an affirmative action plan for the ... advancement of handicapped persons..." 29 C.F.R. § 1613.703: "Agencies shall give full consideration to the ... advancement of qualified ... handicapped persons."

A case involving an advancement involves a promotion which, by its very nature, only involves one job, with a certain set of requirements. If a person applying for an advancement is denied it on the basis of an employer's perception that he is incapable of satisfying the demands of that particular job and then, by the invocation of the Forrisi rule, cannot prove he is "regarded as having" a substantial impairment, he has little hope of ever advancing in employment and the congressional purpose of emphasizing advancement will be frustrated.[6]

---

[6]Plaintiff's evidence would prove that the position description was altered, by including additional requirements specifically designed to exclude Reeder, cf. Davis v. Frank, 711 F.Supp. 447 (N.D. Ill. 1989), and that normal processes in handling

The better rule would be to apply Forrisi in cases involving hiring and firing but abandon Forrisi in cases of advancement. This would be consistent with the statute and the regulations. See 29 C.F.R. § 32.3: "A handicapped person who is likely to experience difficulty in ... advancing in employment would be considered substantially limited." The question of whether an impairment is substantially limiting to a person's ability to advance should be determined by looking at the particular advancement sought. The Sixth Circuit has recognized this concept in Taylor v. United States Postal Service, 57 EPD ¶41,046, 68, 618, 946 F.2d 1214, 1217 (6th Cir. 1991):

> In this case we believe that Taylor has established that he was "regarded as having" a physical impairment and that this perception substantially limited his ability to work. We acknowledge that a per se rule that permitted every unsuccessful applicant who was rejected due to a job requirement to be deemed handicapped under the Act "would stand the Act on its head." Forrisi, 794 F.2d at 995.

---

promotions were not followed and that the reasons given for denying the promotions are pretextual.

> However, a per se rule that never permitted an unsuccessful job applicant to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so-called job requirement due to a physical impairment would likewise stand the Act on its head. How else would a person who, for example, had a cosmetic disfigurement ever prove that he was handicapped under the Act except by pointing to the fact that an employer did not hire him for that reason. See Arline, 480 U.S. at 283 n.10 (cosmetic disfigurement listed in regulations as illustrative of a physical impairment covered by the Act). (emphasis added)

A fact finder could reasonably conclude that the Postal Service's refusal to grant Reeder a detail to the position he sought suggested that the employer perceived his impairment as severely limiting him in performing work-related functions in general and that Reeder would be precluded generally from advancing in the maintenance field.[7]

---

[7]Thus, even if Forrisi v. Bowen is followed, Reeder meets the test. The Postal Service's comments about Reeder reflects a myth, perception or stereotype that Reeder would be unsuitable in any position where speaking or fairly heavy use of the telephone is involved.

SUMMARY JUDGMENT WAS IMPROPER

In this case, Reeder, at his deposition and in his answers to defendant's written discovery requests, consistently maintained that his impairment substantially limits his ability to communicate - people don't listen to him, do not exercise the needed patience, his ability to speak varies greatly, it limits his social interaction, it interferes with his ability to speak and work, he has difficulty communicating 90% of the time. Such surely raised a question of fact as to the substantiality of Reeder's impairment.

Reeder testified as to his long and ultimately frustrating search for medical treatment of his impairment (the "record of" issue). Such testimony surely raised a question of fact as to whether Reeder had a history of such an impairment on which reasonable men and women could reach different conclusions. Taylor v. U.S. Postal Service, 946 F.2d 1214, 1217 (6th Cir. 1991); Byrne v. Board of Education, 979 F.2d 560, 565-567 (7th Cir. 1992).

Reeder produced evidence regarding upper level management's consideration of his impairment (the "regarded as having" issue). Such would allow a jury reasonably to differ about whether management treated him as having a substantially limiting impairment. Leckelt v. Board of Comrs. of Hosp. Dist. No. 1, 909 F.2d 820, 825 (5th Cir. 1990).

The trial court should have deemed Reeder's evidence as to his impairment as sufficient to raise a fact question as to its substantiality. See Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368 (3rd Cir. 1991); Byrne v. Board of Education, 979 F.2d 560 (7th Cir. 1992).

3. §504 DOES PROVIDE A PRIVATE RIGHT OF ACTION.

The trial court determined that even if Reeder could establish that his impairment was substantial, it could not consider Reeder's claims under § 504 of the Rehabilitation Act because of the Tenth Circuit's decision in Johnson v. United States Postal Service, 861 F.2d 1475 (10th Cir. 1988), cert. denied, 493 U.S. 811, 110

S.Ct. 54, 107 L.Ed.2d 23 (1989). In Johnson, the Tenth Circuit had decided that only § 501 (and not §504) provides a private cause of action for federal employees alleging discrimination in employment on the basis of handicap.

The Court of Appeals for several other circuits have concluded that § 501 and § 504 each establish independent bases for private rights of action, and, either expressly or by logical extension, against the federal government and the Postal Service as employer.[8] Johnson v. United States Postal

---

[8]See the decisions of the following circuits:

Second, Doe v. New York University, 666 F.2d 761 (1981); Third, N.A.A.C.P. v. Medical Center, Inc., 599 F.2d 1247 (1979); Strathie v. Department of Transportation, 716 F.2d 227, 230 (1983), Fourth, Southeastern Community College v. Davis, 574 F.2d 1158 (1978) reversed on other grounds, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed 2d 980 (1979); Fifth, Prewitt v. United States Postal Service, 662 F.2d 292, 304 (1981), Sixth, Smith v. United States Postal Service, 742 F.2d 257, 259-60 (1984), Seventh, Carter v. Casa Central, 849 F.2d 1048 (1988), Eighth, Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985); Morgan v. United States Postal Service, 798 F.2d 1162, 1165-66 (8th Cir. 1986), cert. denied, 480 U.S. 948 1075 S.Ct. 1608, 94 L.Ed 2d 794 (1987), and Eleventh, Treadwell v. Alexander, 707 F.2d 473 (1983).

Service seems to be against the weight of authority.

The D.C. Circuit has apparently not decided the question, Milbert v. Koop, 830 F.2d 354, 357, 44 FEP 1694 (D.C. Cir. 1987).

The Supreme Court has not directly addressed the issue. See Coleman v. Darden, 595 F.2d 533, (10th Cir. 1979), cert. denied, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed 2d 184 (1979); Southeastern Community College v. Davis, 442 U.S. 397, 405 note 5, 410-11 99 S.Ct. 2361, 2366, note 5, 2369, 60 L.Ed. 2d 980 (1979). See also Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 104 S.Ct. 1248, 1253-55, 79 L.Ed 2d 568 (1984), Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed 2d 746 (1984); Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 720-721 and note 20, 83 L.Ed 2d 661 (1985); School Board of Nassau County v. Arline, 480 U.S. 273, 94 L.Ed 2d 307, 107 S.Ct. 1123 (1987).

Recent cases recognizing both § 501 and § 504 as bases for actions against the Postal Service include Dexter v. Tisch, 660 F.Supp. 1418 (D.Conn. 1987); Franklin v. U.S.P.S., 687 F.Supp. 1214 (S.D. Ohio 1988); Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987); Hall v. U.S.P.S., 857 F.2d 1073 (6th Cir. 1988); Davis v. Frank, 711 F.Supp. 447 (N.D. Ill. 1989); See also Annotation 44 A.L.R. Fed. 148 "Construction and effect of § 504 of the Rehabilitation Act of 1973 prohibiting discrimination against otherwise qualified handicapped individuals in specified programs or activities." § 3. See also Longoria v. Harris, 554 F.Supp. 102 (S.D. Texas 1982) and Vickers v. Veterans Administration, 549 F.Supp. 85 (W.D. Wash. 1982). Johnson v. Sullivan, 764 F.Supp. 1053 (D. Md. 1991).

4. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUITS AS TO THE VIABILITY OF A CLAIM UNDER § 504 AND HOLD THAT BOTH SECTIONS PROVIDE PRIVATE CAUSES OF ACTION.

The leading case for the view that both § 501 and § 504 provide private causes of action for federal employees is Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981). The Prewitt court engaged in an exhaustive survey of the legislative history of § 501 and § 504 and concluded that Congress intended federal employees to have the benefit of both sections.

The leading federal case for the view that only § 501 and not § 504 provides a private cause of action for federal employees alleging discrimination on the basis of handicap is McGuinness v. U.S.P.S., 744 F.2d 1318, 1321 (7th Cir. 1984). McGuinness led to Boyd v. U.S.P.S., 752 F.2d 410, 413 (9th Cir. 1985), which led to Johnson. See Johnson at 1477.

The problem with McGuinness and therefore Boyd and therefore Johnson is that none of these three cases acknowledge much less analyze the differing language and

objectives of § 501 and § 504, or review the legislative history of the enactment of the two sections, or face squarely the issue of whether § 504 implies a private right of action for federal employees.

McGuinness, Boyd and Johnson are all exhaustion cases, that is, cases where plaintiffs have sought to avoid the requirement of exhaustion of administrative remedies under § 501 by bringing actions under § 504. In the three cases, the courts have read the exhaustion requirements that exist with respect to § 501 into § 504, and, because Mr. McGuinness, Mr. Boyd and Mr. Johnson had failed to exhaust their administrative remedies so as to be ineligible for relief under § 501, they have also lost under § 504.

See, for example, Judge Posner's holding in McGuinness, supra, at 1321:

> It is not critical in this case which view of Section 504 we adopt, and it is not even clear that there is a practical difference between the two views . . . [it is] a matter of merely technical interest whether both statutes, or only the latter, create a remedy for federal

employment discrimination against the handicapped.

> ... we ... cannot believe that Congress would have wanted us to interpret the Act as allowing the handicapped - alone among federal employees ... complaining of discrimination - to bypass the administrative remedies in Title VII.

See also Judge Canby's opinion in Boyd, supra, at 413:

> Boyd contends that the private right of action under § 504 recognized for federally assisted enterprises in such cases as Consolidated Rail should be available to him as a direct employee of a federal agency, even though discrimination by that agency is far more specifically prohibited by Section 501. What Boyd hopes to gain by this argument is an escape from the requirements of exhaustion.
>
> ... [E]ven if Boyd were to prevail in his contention that Section 504 offers him an alternative remedy, we would feel compelled to read into that remedy the same exhaustion requirements of Title VII . . . that apply under § 501.
>
> . . . .
>
> It therefore makes little practical difference to Boyd that we conclude ... that his claim of discrimination in employment against the Postal Service is cognizable under Section 501 and not 504. He must meet the exhaustion requirement.

The ratio decidendi of McGuinness was as follows:

> [I]t is unlikely that Congress, having specifically addressed employment of the handicapped by federal agencies (as distinct from employment by recipients, themselves nonfederal, of federal money) in Section 501, would have done so again a few sections later in Section 504.

744 F.2d 1318 at 1321 (1984).

The legislative history as discussed in Prewitt at 304, clearly refutes such a ratio decidendi:

> Thus, by its 1978 amendments to the Rehabilitation Act, Congress clearly recognized both in section 501 and in section 504 that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the federal government and its agencies. The amendments to section 504 were simply the House's answer to the same problem that the Senate saw fit to resolve by strengthening section 501. The joint House-Senate conference committee could have chosen to eliminate the partial overlap between the two provisions, but instead the conference committee, and subsequently Congress as a whole, chose to pass both provisions, despite the overlap. "When there are two acts upon the same subject, the rule is to give effect to both if possible." United States v. Borden Co., 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939).

The only case to have examined the legislative history of the 1978 amendments to the Rehabilitation Act of 1973 in detail, Prewitt, concluded that Congress addressed the problem in both § 501 and § 504. Reeder's causes of action under § 504 state viable claims.[9]

---

[9]Furthermore, the Tenth Circuit may not be unified. See Pushkin v. Regents of University of Colorado, 658 F.2d 1372 at 1377 ("Every court of appeals and district court ... which have considered this question have held that a private right of action exists under the statute (referring to § 504)". See also Daubert v. U.S.P.S., 733 F.2d 1367, 1371-72 (1984) (acknowledging that the Supreme Court's decision in Southeastern Community College v. Davis has been repeatedly relied upon and cited for the proposition that a viable cause of action exists under § 504.)

It may be nonsensical to conclude that nonfederal employees or employees of an employer with federal funding can sue their employers under §504 but federal employees cannot.

One of the more interesting recent cases on this controversy is DiPompo v. West Point Military Academy, 708 F.Supp. 540 (S.D.N.Y. 1989). DiPompo is one of the few cases holding that § 501 is the exclusive remedy in which the court attempts to review the legislative history but DiPompo is basically an exhaustion case as well. In DiPompo, the court analyzed the legislative history of § 505(a)(1) (794a(1)(1) and (2)) to preclude a holding that §504 reached the federal government as employer. The DiPompo court did so on the basis that to hold otherwise

The differing language of the two sections reveals differing purposes and dictates a recognition of causes of action both §501 and §504. In Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979), the Supreme Court noted:

> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the

---

would permit an "end run" around the requirement to exhaust administrative remedies.

Of course, the answer to that line of thinking is merely to read into §504 the same procedural requirements of exhaustion that apply in other employment discrimination cases into §501. See Prewitt v. United States Postal Service, 662 F.2d at 304, Smith v. United States Postal Service, 742 F.2d at 260, 262, and Morgan v. United States Postal Service, 798 F.2d at 1165:

> It seems unlikely that Congress would have enacted two statutes under which claims could be brought against the federal government, but only required exhaustion for one of them. To avoid administrative remedies simply by artful pleading is not a desirable result. Consequently Morgan is required to exhaust administrative remedies even though he filed suit under § 504.

This would eliminate the end run approach and ease the reluctance to acknowledge a cause of action under § 504. See Johnson, 861 F.2d 1475, footnote 4.

> distinction between the even handed treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps.

See also Shirey v. Devine, 670 F.2d 1188, 1201 (D.C. Cir. 1982) (discussing distinction between "mere evenhanded treatment" and "affirmative action"), and Davis v. Frank, 711 F.Supp. 447, 453 (N.D. Ill. 1989):

> Section 501 imposes an affirmative duty upon the Postal Service "to structure [its] procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion." ... Section 504 imposes a duty upon the Postal Service not to discriminate against an "otherwise qualified individual."

This Court should reject the Tenth Circuit approach and hold that both sections provide avenues for relief for discrimination in federal employment on the basis of handicap.[10]

---

[10]§501 mandates affirmative action. §504 prohibits intentional discrimination on the basis of a handicap. With their different purposes they have somewhat different burdens of proof and also permit differing relief. The relief available to a plaintiff prevailing under §501 is equitable. If plaintiff is successful in making out a case under §504 he may recover compensatory monetary damages and by virtue of the Seventh

D. CONCLUSION

Reeder has raised a genuine issue of material fact as to the substantiality of his impairment. Reeder has made a showing sufficient to establish this threshold element of his case under §501, and the summary judgment should be reversed. Celotex Corp. v. Catrett, 447 U.S. 317 at 322, 106 S.Ct. 2548 at 2552, 91 L.Ed 265 at 273 (1986).

This Court should hold §504 of the Rehabilitation Act does establish a private right of action.

This court should remand this case for a trial on the merits of Reeder's causes of action under both §501 and §504.

Amendment the Plaintiff may also have a right to a trial by jury although the application of such principles in federal government employment is problematical. See Smith v. Barton, 914 F.2d 1330, 1337 (9th Cir. 1990), Cortez v. Board of Governors, 766 F.Supp. 623 (N.D. Ill. 1991) and cases cited therein. There is authority to the contrary. See Smith v. Barton, footnote 12 and Cortez v. Board of Governors, footnote 2.

Dated this 7th day of May, 1993.

ROMNEY & CONDIE

By _____
David J. Holdsworth
Attorney for Appellant

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I hereby certify that on this 8th day of May, 1993, forty copies of the above and foregoing Petition for Writ of Certiorari were mailed to the Clerk of the Supreme Court of the United States of America by depositing the same in the United States mail at Salt Lake City, Utah, first class, postage prepaid, addressed to the Clerk, the Supreme Court of the United States of America, Washington, D.C. 20543. I also certify that two true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to the persons identified below by depositing the same in the United States mail at Salt Lake City, Utah, first class, postage prepaid, and properly addressed to:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Robert P. Sindermann, Jr., Attorney
Office of Labor Law
United States Postal Service
475 L'Enfant Plaza S.W.
Washington, D.C. 20260-1132

Robert V. Zener,
Appellate Litigation Counsel

Civil Division
U.S. Department of Justice
Room 3617 Main
10th & Pennsylvania Ave. N.W.
Washington, D.C. 20530-0001

David J. Holdsworth

djh2223

APPENDIX

Court of Appeals Decision, February 9, 1993

Trial Court Memorandum Decision, March 19, 1992

Article on Spasmodic Dysphonia

(Filed February 9, 1993)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

IVAN C. REEDER,	)	
	)	
Plaintiff-Appellant,	)	No. 92-4055
	)	(D.C. No.
v.	)	90-C-506-S)
	)	(D. Utah)
ANTHONY M. FRANK, Postmaster General of the United States, authorized representative of the United States Postal Service,	)	
	)	
Defendant-Appellee	)	
	)	

ORDER AND JUDGMENT[1]

Before **MOORE**, **TACHA**, and **BRORBY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially

---

[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Ivan C. Reeder is an employee of the United States Postal Service. After twice applying for and failing to receive a promotion, Reeder brought this suit against Anthony M. Frank, Postmaster General of the United States. In his lower court complaint, Reeder alleged causes of action for violation of §§ 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794; for violation of the Postal Reorganization Act, 39 U.S.C. §§ 1001(b), 1103(b); and for breach of an implied employment contract and implied covenant of good faith and fair dealing. The district court granted summary judgment for the Postal Service on all of Reeder's claims. On appeal, Reeder contests only the disposition of the claims under the Rehabilitation Act. Reeder argues that summary judgment was improper for these claims because a genuine issue of material fact exists as to the § 501 claim and because

the Tenth Circuit law precluding Reeder's § 504 claim is incorrectly decided.

As to Reeder's § 501 claim, we affirm for substantially the reasons given by the district court the conclusion that Reeder did not qualify as a handicapped person under the Act. See Memorandum Decision at 16-26. Because Reeder's § 504 claim also requires an initial determination that the individual is handicapped, we dismiss as moot Reeder's request to reconsider our decision in Johnson v. United States Postal Service, 801 F.2d 1475 (10th Cir. 1988), cert. denied, 439 U.S. 811 (1989).

AFFIRMED. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

(Filed March 19, 1992)

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

****

IVAN C. REEDER	)	
Plaintiff,	)	Case No. 90-C-0506-S
vs.	)	
ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE,	)	MEMORANDUM DECISION
Defendants.	)	

****

This matter is before the Court on defendant's motion for summary judgment. The Court, having considered the relevant facts, pleadings and law, now issues its memorandum decision.

I. Facts

Plaintiff, Ivan C. Reeder ("Reeder"), brought this action against Anthony M. Frank, Postmaster General of the United States (the "Postmaster"). Reeder, a postal employee, alleges that he has been discriminated

against as a result of a speech impediment. The Postmaster concedes that Reeder has a speech "impairment," although the parties dispute its severity.[1]

Reeder has been aware of his speech impairment for at least thirty years, but avers that his impairment cannot be readily classified in current medical terms.[2]

---

[1]Reeder asserts that "[he] has a speech condition, disorder, dysfunction or impediment which is an impairment and which impairment substantially limits one or more of [his] major life activities, namely communicating." Plaintiff's Second Amended Complaint ¶6. The Postmaster disputes Reeder's characterization of his impairment as one that substantially limits one of his major life activities.

[2]Reeder acknowledges that his speech impairment does not affect his ability to read, hear and understand. Rather, he characterizes his impairment as restricting his ability to respond. Reeder maintains that speaking requires him to expend an extra effort that is not expended by an individual not suffering from such an impairment. Reeder concedes that the impairment does not rise to the level of "aphasia," which he defines as language disorder, or "aphonia," which is a loss of voice, but could "probably most accurately [be] labelled or classified as vocal hyperfunction or dysphonia." Plaintiff's Responses to Defendant's Second Set of Admissions, Interrogatories and Requests for Production of Documents, Answer No. 1.

However, Reeder concedes that he has not consulted a doctor about his speech impairment since at least 1984. Reeder did undergo surgery approximately twenty years ago to remove nodules on his vocal cords and he maintains that the surgery was related to his present speech impairment. However, Reeder has not provided medical records to support this claim.

Reeder began working for the Postal Service in 1973 as a Distribution Clerk, with a grade of PS-05. In 1974, Reeder transferred tc the Maintenance Craft division, the area of his current employment. During Reeder's tenure with the Postal Service, he has received several promotions. The record indicates that Reeder has advanced, in the Maintenance Craft division, from the position of Custodial Laborer, with a grade of PS-03, to his current position of Maintenance Control Supervisor, with a grade of EAS-14.

On or about April 13, 1989, Reeder applied with the Postal Service for the position of Maintenance Programs Specialist, which has a grade of EAS-19. On or about August 3, 1989, the Postal Service awarded the position to another employee. Reeder alleges that the Postal Service rejected his application for the position because of his speech impediment.

Reeder made a second attempt to secure the position during the subsequent year. One or before June 8, 1990, he applied with the Postal Service for the same position. Reeder received notice on or about August 6, 1990 that the Postal Service had declined to act favorably on this application. Reeder alleges that the Postal Service once against rejected his application for the position because of his speech impediment.

Reeder filed suit on June 11, 1990, asserting five causes of action arising from the alleged discrimination that occurred during the Postal Service's denial of his

first application for advancement. In his first and second causes of action, Reeder alleges that the Postal Service violated his rights under sections 501 and 504 of the Rehabilitation Act. See 29 U.S.C. §§ 791, 794 (1982) (amended and renumbered in 1978).

. . . .

Reeder amended his complaint on June 3, 1991 to incorporate claims resulting from the Postal Service's alleged discriminatory treatment of his second application for advancement. In his amended complaint, Reeder realleged the causes of action asserted under the original claim and alleged identical causes of action for the second claim.

The Court has considered the relevant facts, pleadings and law with respect to the specific causes of action alleged by Reeder and will now address each cause of action individually in light of the summary judgment standard set forth below.

II. Summary Judgment

Under Federal Rule of Civil Procedure 56, summary judgment is proper only when the pleadings, affidavits, depositions or admissions establish there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party.[3] E.g., Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). This burden has two distinct components: an initial burden of production on the moving party, which burden when satisfied shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party. See 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983).

---

[3]Whether a fact is material is determined by looking to relevant substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

The movant bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and affidavits, if any, he believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323, 106 S. Ct. at 2553, 91 L. Ed. 2d at 274. In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court there is an absence of evidence in the record to support the nonmovant's case.[4] Id., 477 U.S. at 323,

---

[4]In his dissent in Celotex, Justice Brennan discussed the mechanics for discharging the initial burden of production when the moving party seeks summary judgment on the ground the nonmoving party--who will bear the burden of persuasion at trial--has no evidence:

> Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a 'burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence

106 S. Ct. at 2554, 91 L. Ed. 2d at 275. "[T]here can be no issue as to any material fact . . . [when] a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id.

III. Discussion

. . . .

A. Plaintiff's First and Sixth Causes of Action - Defendant's Alleged

---

> of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

477 U.S. at 323, 106 S. Ct. at 2557-58, 91 L. Ed. 2d at 279 (citations omitted).

Violation of Section 504[5] of the Rehabilitation Act.

Counts one and six of Reeder's complaint allege that the Postmaster violated section 504 of the Rehabilitation Act. Section 504 provides:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by . . . the United States Postal Service.

29 U.S.C. § 794 (1982). Reeder asserts that his speech impediment does not preclude him from meeting the criteria of an "otherwise qualified individual," and that the Postal Service denied Reeder's employment advancement on the basis of his speech impediment.

---

[5]Because Reeder has referred to sections in the Rehabilitation Act that have been renumbered, and for the convenience of the parties, the Court has adopted the parties' outdated section numbers. However, the Court notes that Section 504 of the Rehabilitation Act was amended and renumbered in 1978. In the current version of the United States Code, section 504 is numbered section 794.

The Court is precluded from considering the merits of Reeder's arguments because section 504 does not provide a private cause of action. In Johnson v. United States Postal Service, 861 F.2d 1475 (10th Cir. 1988), cert. denied, 493 U.S. 811, 110 S. Ct. 54, 107 L. Ed. 2d 23 (1989), the United States Court of Appeals for the Tenth Circuit stated:

> Section 501--not section 504, under which the plaintiff has brought this action--provides for a private cause of action for federal employees.
> ...
> We hold, furthermore, that only section 501 provides a private cause of action for federal employees bringing an action alleging employment discrimination based on handicap.

Id. at 1477-78 (footnote omitted). This Court is bound to follow the precedent of the Tenth Circuit Court of Appeals. Accordingly, Reeder's first and sixth causes of action, alleging violation of section 504 of the Rehabilitation Act, are dismissed.

. . . .

D. Plaintiff's Second and Seventh Causes of Action - Defendant's Alleged Violation of Section 501[9] of the Rehabilitation Act of 1973.

Reeder alleges that the Postal Service violated section 501 of the Rehabilitation Act. Section 501 requires the federal government to take affirmative steps to hire handicapped individuals. It provides: "It shall be the purpose and function of the [Interagency Committee on Handicapped Employees] . . . to provide a focus for Federal and other employment of individuals with handicaps. . . . 29 U.S.C. § 791(a) (1983) (emphasis added). Moreover, section 706 of the Rehabilitation Act defines "individual with handicaps" as "any person who (i) has a physical or mental impairment

---

[9]Section was amended and renumbered in 1978. It currently is numbered § 791. The Court elects to use the old section number for clarity because it is the number that the parties have used in their briefs.

which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (1982).

In a case in which an employee asserts employment discrimination on the basis of a handicap, the employee has the initial burden of satisfying "the threshold requirement that [the employee] is a handicapped person as defined by the statute." Jasany v. United States Postal Service, 755 F.2d 1244, 1248 (6th Cir. 1985). Reeder avers that the record he has provided demonstrates that he could be deemed an "individual with handicaps" under all three of the criteria established in section 706(7)(B). Therefore, the Court will discuss each criterion individually.

i. Employee Has a Physical Impairment that Substantially Limits a Major Life Activity.

Reeder has alleged that his speech disorder is a substantial limitation on a major life activity. To recover under this theory, Reeder must meet the threshold requirement of proving that he has a handicap as such is defined by the Rehabilitation Act. Accordingly, Reeder must prove: 1) he has a physical impairment; and 2) the impairment imposes a substantial impairment on a major life activity.

Neither the language of the Rehabilitation Act nor its legislative history provide a good definition of "impairment." However, the Department of Health and Human Services defines "physical impairment" as "any physiological disorder or condition . . . affecting one or more of the following body systems . . . including speech organs." Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance, 45 C.F.R. § 84.3(j)(2)(i) (1991).

Applying the Department of Health and Human Services' definition to Reeder's speech disorder, his disorder can be characterized as an "impairment" because it presumably is a physiological disorder and it clearly affects his speech organs. However, an impairment cannot be classified as a handicap unless the impairment substantially limits the a major life activity. The Utah Supreme Court examined the Utah statute, which utilizes the Rehabilitation Act's definition of "handicap," and concluded:

> If the Legislature contemplated a broad definition of the term "impairment," as the Commission has held, it clearly assigned two major qualifications with the words substantially limits and major life activity. Each limitation qualifies the types of "impairment for which discrimination is forbidden, and each includes a word of magnification. The Legislature's apparent purpose was to prevent every termination or denial of employment on the basis of a physical or mental characteristic ("impairment") from constituting a prima facie case of discrimination on the basis of handicap.
>
> Most or all persons have some physical or mental deviations from a norm or from personal or employer aspirations. Consideration of height, weight, sensory abilities,

> speech, pulse rate, blood pressure, and a whole variety of measures of mental ability are only a few characteristics whose variations can be deemed "impairments" under the broad definition discussed earlier. If the Legislature had intended that all employer decisions based on any such impairments would be forbidden as discrimination against the handicapped (unless justified as a bona fide occupational qualification), the statutory definition should have stopped with the word "impairment."

Salt Lake City Corp. v. Confer, 674 P.2d 632, 636 (Utah 1983) (emphasis in original); see also School Board of Nassau County, Florida v. Arline, 480 U.S. 273, 107 S. Ct 1123, 94 L.Ed2d 207 (1987); Forrisi v. Bowen, 794 F.2d 931, 933-34 (4th Cir. 1986); Oesterling v. Walters, 760 F.2d 859, 861 (8th Cir. 1985).

In this case, the Court recognizes that Reeder's speech impairment affects a major life activity.[10] In Reeder's complaint, he

---

[10]The Equal Employment Opportunity Commission has defined "major life activities" as "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." Equal Employment Opportunity in Federal Government, 29 C.F.R. § 1613.702(c) (1991) (emphasis added).

avers that the speech impairment affects a major life activity--his ability to communicate.[11] Therefore, the dispositive issue is whether Reeder's speech disorder

---

[11]In Plaintiff's Memorandum to Defendant's Motion for Summary Judgment, Reeder also alludes to the fact that his speech impairment affects another major life activity--his ability to work. The Court has reviewed this claim and finds that Reeder's speech disorder does not substantially affect his ability to work. In so holding, this Court has reviewed the seminal case E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088 (D. Haw. 1980).

In Black, the court opined: "A person who is disqualified from employment in his chosen filed has a substantial handicap to employment and is substantially limited in one of his major life activities." Id. at 1099. In considering whether an impairment is a substantial limitation, the Black court noted that such a determination must be made on a case-by-case basis, and must include consideration of the "number and types of jobs from which the impaired individual is disqualified." Id. at 1100.

Reeder began his employment with the Postal Service in the Maintenance Systems Division as a level 4 employee. During his tenure with the Postal Service Reeder has been promoted to his current position in which he has supervisory responsibility for nine other employees. There is nothing in the record to suggest that Reeder's speech disorder has impaired, or will impair, his career advancement within the Postal Service. Indeed, Reeder has advanced from the ranks of the general Postal Service work force to management within the organization.

constitutes a "substantial impairment" to his ability to speak.

The Court believes that Reeder's speech disorder does not constitute such an impairment. The record reflects the fact that Reeder is able to communicate through speech. During Reeder's deposition, he was able to speak for approximately seven hours. Reeder spoke "intelligibly" and testified that the manner in which he spoke during his deposition was "typical" of his ability to speak generally. Memorandum in Support, at page 13.

Moreover, Reeder never officially declared his speech disorder when applying for employment with the Postal Service. The Postal Service has a form entitled "Identification of Physical/Mental Disability" on which Reeder could have reported his speech disorder. The form defines a "reportable disability" as a "physical or mental impairment that substantially limits one or more major life

activities" and includes a category for speech impairments. Although Reeder now asserts that his speech impediment is a substantial limitation, he never formally declared his speech disorder on this form.

Additionally, Reeder has failed to provide an adequate medical record of his impairment. Although Reeder produced a lengthy list of the doctors and other professionals he visited, Reeder is unable to corroborate such visits with medical records or other evidence.

For the reasons cited above, this Court concludes that, when the evidence is construed in the light most favorable to Reeder as the summary judgment standard requires,[12] Reeder has failed to meet the threshold requirement of proving that his speech impairment substantially limits a major life activity.

---

[12]See, e.g., Renfro v. City of Emporia, Kansas, 948 F.2d 1529, 1533 (10th Cir. 1991) ("we examine the facts most favorable to the party opposing summary judgment.").

ii. Employee Has a Record of the Physical Impairment.

An employee may be deemed handicapped if the employee has a record of impairment. Although Reeder claims to have provided a record of his physical impairment, he has failed to provide such a record. Reeder did provide a lengthy list of doctors with whom he has consulted; however, Reeder admits that he has not consulted a doctor about his speech impediment since at least 1984. Moreover, in response to the Postmaster's discovery requests, the only medical records Reeder provided to corroborate the nature and purpose of his visits to the doctors he listed as having treated him for his speech impairment were medical records from John Aldrich, who expressly denied treating Reeder for his speech impairment. In the records that Dr. Aldrich provided, the only reference to Reeder's speech impairment is contained in the portion of the record reviewing his medical history. It states: "Reeder has had a problem with his larynx for many years. It

is associated with some difficulty in speech." Memorandum in Support, at Exhibit 7.

In addition, Reeder asserts that he had surgery to remove nodules on his larynx. However, Reeder did not provide any proof that such a surgery took place, and that such surgery was undertaken to improve his speech impairment. Assuming Reeder's assertions are true, this Court finds that such evidence does not meet the threshold requirement of proving that Reeder is an individual with a handicap.

iii. Employee is Regarded as Having a Handicap.

Reeder maintains that the Postal Service regards him as having a speech impairment. Reeder asserts that the fact another employee was given a thirty-day telecommunications detail in July, 1989 demonstrates that the Postal Service regards him as having a handicap. Reeder alleges that he was told by

his supervisor, Kenneth McArthur ("McArthur"), that he was not given the telecommunications detail because of his speech impediment, and McArthur acknowledges "[Reeder's] speech impediment was a minor factor in the decision to deny him the detail because the detail "was a solo operation that involved fairly heavy use of the telephone." Declaration of Kenneth McArthur in Support of Defendant's Motion for Summary Judgment, at ¶ 6 ("McArthur Declaration").

The Postal Service does not regard Reeder as handicapped merely because it concluded that his speech impairment could affect his ability to function effectively in the telecommunications detail that it awarded to another employee in July, 1989. As the United States Court of Appeals for the Fourth Circuit has noted: "Several courts have previously addressed this issue, deciding unanimously that an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands

of a particular job." Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) (citations omitted); see also Daley v. Koch, 892 F.2d 212 (2d Cir. 1989); Miller v. AT&T Network Sys., 722 F. Supp. 633, 640 (D. Or. 1989), aff'd, 915 F.2d 1404 (9th Cir. 1990). The Forrisi court reasoned that "[t]he statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." Id. at 935.

In Forrisi, the plaintiff was a utility systems repairer and operator, a position that required the plaintiff to climb stairways and ladders. The plaintiff was terminated from his job because he suffered from acrophobia and could not perform such duties. Id. at 933. In refusing to uphold the plaintiff's claims under the Rehabilitation Act, the court stated: "Far from being regarded as having a 'substantial limitation' in employability, [the plaintiff]

was seen as unsuited for one position in one plant--and nothing more." Id. at 935.

The Court finds persuasive the reasoning provided in the Forrisi opinion. Reeder was denied the telecommunications detail in part because it required heavy use of the telephone. However, this does not demonstrate that the Postal Service regarded Reeder as having a handicap. The telecommunications detail was merely one employment position. The Postal Service's refusal to grant Reeder this detail does not suggest that he would be precluded, generally, from the type of employment in which he is currently engaged, or for which he has received his training. The record clearly demonstrates that, during the course of Reeder's employment with the Postal Service, he has advanced from a craft employee, level 3, to management, level 14. Therefore, the Court concludes that Reeder's allegations and the evidence he has produced do not demonstrate the Postal Service regards Reeder as handicapped.

Reeder also asserts that the Postal Service has accommodated him because McArthur has not required him to carry a walkie talkie at work and McArthur avoids talking with him via the walkie talkie system. Memorandum in Opposition, at ¶ 15. However, McArthur explained that Reeder's job does not require use of a walkie talkie. Thus, Reeder's allegations with respect to the walkie talkie are simply not material to the resolution of his claim.

Moreover, in his deposition Reeder admitted that during his career with the Postal Service "there has been no accommodation." Deposition of Ivan C. Reeder, at page 81, lines 15-16. Because the government has the responsibility to accommodate the employee,[13] and Reeder admits that the Postal Service has not made any such accommodations, Reeder's assertions that the

---

[13]See Equal Employment Opportunity in Federal Government, 29 C.F.R. § 1613.704(a) (1991) ("An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee. . . .").

Postal Service's treatment of Reeder in his current position demonstrate the Postal Service regards him as handicapped are without merit.

In summary, to prevail under section 501 of the Rehabilitation Act, Reeder must prove that he is an "individual with handicaps." Reviewing the record in the light most favorable to Reeder, as the summary judgment standard requires, this Court concludes that Reeder has not provided sufficient material and admissible evidence to support a prima facie claim under the Rehabilitation Act. Accordingly, the Court dismisses Reeder's second and seventh causes of action.

IV. Conclusion

The Court, having read the pleadings and being fully apprised of the relevant facts and law, hereby grants the Postmaster's Motion for Summary Judgment in its entirety.

Dated this 18th day of March, 1992.

BY THE COURT:

/s/
DAVID SAM
U.S. DISTRICT JUDGE

Written by Mitchell F. Brin, M.D. and Deborah de Leon, D.D.S., Dystonia Clinical Research Center, Columbia Presbyterian Medical Center, New York.

WHAT IS SPASMODIC DYSPHONIA?

Spasmodic Dysphonia is also known as Spastic Dysphonia or Laryngeal Dystonia. It is a neurological condition, a form of dystonia, affecting the vocal muscles of the larynx. Like other forms of dystonia (such as blepharospasm and torticollis) it is characterized by abnormal involuntary movements. In spasmodic dysphonia, the vocal cord muscles contract so that speech is effortful and often strained and strangled. The voice may be tremulous or breathy. Symptoms may improve or disappear when yawning, laughing, singing or relaxing. Symptoms of spasmodic dysphonia may be aggravated by certain tasks such as talking on the telephone, or emotional stress. However, SD is not caused by stress.

WHAT ARE THE DIFFERENT TYPES OF SD?

Doctors recognize two types of SD. In the **adductor** type, speaking causes abnormal involuntary excessive constriction of the

muscles that bring the vocal cords together. This causes a strained, strangled, choked voice quality, often with abrupt initiation and termination of voicing resulting in a broken speech pattern and short breaks in speech. In the **abductor** type, there is overcontraction of the muscles that separate the vocal cords, resulting in a sloppy and breathy, whispering voice pattern. In some patients, the involuntary muscle contractions result in an irregular voice tremor.

WHAT CAUSES SD?

In most cases, the cause of SD is not known. In some cases it appears that the onset of spasmodic dysphonia may be triggered by trauma to the vocal cords. It can be caused by phenothiazines, a type of medication known to cause dystonia. Regardless of the cause, the symptoms of SD are thought to be due to abnormal functioning in an area of the brain called the basal ganglia. The basal ganglia are situated at the base of the brain and help to coordinate movements of muscles throughout the body. In some, the normally smooth coordination of the

vocal cords is interrupted, resulting in an abnormal voice pattern.

HOW IS SD DIAGNOSED?

SD is a rare condition and if often mistaken for "vocal abuse" or "vocal strain." Because there is no definitive test as to the condition, the diagnosis rests on the presence of characteristic clinical symptoms and signs, in the absence of other conditions that may mimic SD. Most patients are evaluated by a neurologist who carefully searches for other signs of dystonia or other neurological conditions, an otolaryngologist who will examine the vocal cords and their movements, and a speech-language pathologist who evaluates voice production and vocal quality.

Symptoms of SD may be present in association with other signs of dystonia. The term dystonia describes a syndrome dominated by sustained muscle contractions frequently causing twisting and repetitive movements, or abnormal postures. Other types of dystonia include blepharospasm - characterized by excessive eye blinking and

involuntary forced eye closure, torticollis - characterized by abnormal movements and postures of the head and neck, and writers cramp - associated with an abnormally tight grip and abnormal postures of the hand, arm and shoulder when writing. In most cases, dystonic symptoms remain restricted and remain in isolation as a "focal dystonia." However, in generalized cases, dystonia may affect many muscles of the body. Occasionally, remission may occur.

Although it can start at any time during life, SD seems to begin most frequently in the 40-50 year old age group. SD is slightly more common in women than men. A genetic factor is suspected in some patients because other family members may have signs or symptoms of dystonia of the larynx or dystonia involving some other segment of the body.

CURRENT FORMS OF THERAPY

Since the underlying cause of SD in unknown, there is at present no cure for the condition. **Physical methods** of therapy (speech therapy, relaxation therapy) moderate

symptoms in SD, but are not of long-term benefit to most. However, speech therapy may play an important role in alleviating some of the symptoms of SD. **Drug therapy** provides little relief of symptoms. **Surgical therapy** by sectioning the recurrent laryngeal nerve has initially met with favorable reports; subsequent review revealed that by 3 years, 64% were not improved and 48% were worse than before surgery.

Local injections of botulinum toxin (Botox) into the vocal cord muscles have proven to be the most efficacious form of treatment for this condition. Botulinum toxin is a toxin produces by the Clostridium botulinum bacteria. It paralyzes muscles by blocking the nerve impulse to the muscle. When diluted and injected into the vocal cord muscles in very small quantities, it can provide significant relief of SD and a marked improvement in voice quality. The effect of the Botox lasts an average of 3-4 months, after which reinjection is necessary. Side effects can include temporary softness and breathiness of speech, or transient

difficulty with swallowing. The toxin can be effective in all forms of the condition and should be administered by a physician specially trained in the anatomy and physiology of the larynx, and in the administration of the toxin. Based on the current information, Botox is the treatment of choice for many cases of SD.

SUPPORTIVE FORMS OF TREATMENT

Supportive therapy with speech therapy may be helpful in conjunction with Botox treatment. Stress usually aggravates the symptoms of all movement disorders, including SD. Some patients may benefit from a trained professional in learning stress management. However, do not expect psychotherapy or stress management to fully treat the symptoms of a medical condition such as SD.

CAN SPASMODIC DYSPHONIA BE GENETIC?

We have found family histories of dystonia in approximately 20% of our patients with SD. Some had dystonic symptom involving the larynx and others had involvement of other segments of the body. Those with a family history of dystonia had a younger age

at onset. Markers for the gene causing dystonia in some familial cases have been located on chromosome 9. We recommend that patients with SD seek genetic counseling if they are concerned about the potential genetic risks in their family.

WHAT RESEARCH IS BEING DONE?

The ultimate goals of research are discovering the cause of SD so the disorder can be prevented and finding a cure or improved treatment for people not afflicted. Dystonia scientists are exploring better treatments and testing to see how to extend the benefit from current therapies for SD. They are examining the psychosocial complications of having this condition. These studies are providing physicians and other health workers with clues for identifying people who are at risk for developing SD.

We know SD and other forms of dystonia are due to abnormal functioning of deep centers in the brain called the basal ganglia. Yet, we do not know the precise

cause. Without knowing the cause, we cannot develop better treatments.

There are many new highly specific tests we could use on brain tissue from people who had SD. These tests might - ultimately will reveal the cause of SD and other dystonias.

Supreme Court, U.S.
FILED
JUL 9 1993

No. 92-1788

(2)

Supreme Court, U.S.
FILED
JUL 9 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

IVAN C. REEDER, PETITIONER

v.

MARVIN T. RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ROBERT V. ZENER
EDWARD T. SWAINE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the district court erred in granting summary judgment against petitioner on the ground that his speech impairment did not qualify him as an "individual with a disability" within the meaning of the the Rehabilitation Act, 29 U.S.C. 706(8)(B), as amended.

2. Whether the district court erred in holding that petitioner did not have a cause of action against the Postal Service under Section 504 of the Rehabilitation Act, 29 U.S.C. 794.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	7
Clark v. *Skinner*, 937 F.2d 123 (4th Cir. 1991)	7
Cortes v. *Board of Governors*, 766 F. Supp. 623 (N.D. Ill. 1991)	9
Doe v. *Garrett*, 903 F.2d 1455 (11th Cir. 1990)	7
Gardner v. *Morris*, 752 F.2d 1271 (8th Cir. 1985)	7
Johnson v. *United States Postal Service*, 861 F.2d 1475 (10th Cir. 1988), cert. denied, 493 U.S. 811 (1989)	3, 7
Johnston v. *Horne*, 875 F.2d 1415 (9th Cir. 1989)	7
Lujan v. *National Wildlife Federation*, 497 U.S. 871 (1990)	6
McGuinness v. *United States Postal Service*, 744 F.2d 1318 (7th Cir. 1984)	7, 9
Milbert v. *Koop*, 830 F.2d 354 (D.C. Cir. 1987)	7
Prewitt v. *United States Postal Service*, 662 F.2d 292 (5th Cir. 1981)	7, 10
Reeder v. *Frank*, 813 F. Supp. 773 (D. Utah 1992)	3
Smith v. *United States Postal Service*, 742 F.2d 257 (6th Cir. 1984)	7, 10
Soberal-Perez v. *Heckler*, 717 F.2d 36 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984)	9
Southeastern Community College v. *Davis*, 442 U.S. 397 (1979)	10
United States Dep't of Transp. v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986)	9

Cases—Continued: Page

Wood v. *President & Trustees of Spring Hill College*, 978 F.2d 1214 (11th Cir. 1992) 9

Statutes and regulations:

Civil Rights Act of 1964:
Tit. VI, 42 U.S.C. 2000d *et seq.* 8
Tit. VII, § 717(c), 42 U.S.C. 2000e-16(c) 8
Postal Reorganization Act, 39 U.S.C. 1001 *et seq*:
39 U.S.C. 1001(b) 3
39 U.S.C. 1003(b) 3
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*:
§ 7(8)(B), 29 U.S.C. 706(8)(B) 4, 6
§ 7(8)(B)(i), 29 U.S.C. 706(8)(B)(i) 4
§ 7(8)(B)(ii), 29 U.S.C. 706(8)(B)(ii) 4
§ 7(8)(B)(iii), 29 U.S.C. 706(8)(B)(iii) 4
§ 501, 29 U.S.C. 791 ..... 2-3, 4, 5, 7, 8, 9, 10
§ 501(b), 29 U.S.C. 791(b) 2
§ .501(g), 29 U.S.C. 791(g) 10
§ 504, 29 U.S.C. 794 ..... 2-3, 5, 7, 8, 9, 10, 11
§ 504(a), 29 U.S.C. 794(a) 3
§ 504(d), 29 U.S.C. 794(d) 10
§ 505(a), 29 U.S.C. 794a(a) 8
§ 505(a)(1), 29 U.S.C. 794a(a)(1) 7-8
§ 505(a)(2), 29 U.S.C. 794a(a)(2) 8
Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344:
§ 102(f)(2), 106 Stat. 4348 (29 U.S.C. 706(8)(B)) 3
§ 102(p)(29), 106 Stat. 4360 (29 U.S.C. 791)) 3
§ 102(p)(32), 106 Stat. 4360 (29 U.S.C. 794)) 3
§ 503, 106 Stat. 4424 (29 U.S.C. 791(g)) 10
§ 506, 106 Stat. 4428 (29 U.S.C. 794(d)) 10
29 C.F.R. 32.3 6
29 C.F.R. 1613.702(c) (1991) 4

Miscellaneous: Page

Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation of Affirmative Action Include Reassignment?*, 67 Tex. L. Rev. 781 (1989) 9

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1788

IVAN C. REEDER, PETITIONER

v.

MARVIN T. RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported, but the judgment is noted at 986 F.2d 1428 (Table). The opinion of the district court (Pet. App. 1b-26b) is reported at 813 F. Supp. 773.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1993. The petition for a writ of certiorari was filed on May 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Ivan C. Reeder, who became an employee of the United States Postal Service in 1973, suffers from a speech impairment that is "probably most accurately labelled or classified as vocal hyperfunction or dysphonia." Pet. App. 2b & n.2. During his tenure as a Postal Service employee, petitioner received several promotions and advanced to a management position having supervisory responsibilities. *Id.* at 3b, 16b n.11. In April 1989, petitioner applied for a promotion to the position of Maintenance Programs Specialist, but the position was awarded to another employee. In June 1990, petitioner again applied for the same position, but he received notice in August 1990 that his application was denied. *Id.* at 4b.

2. Petitioner filed this action on June 11, 1990, alleging that the Postal Service's denial of his first promotion application violated Sections 501[1] and 504[2] of the Reha-

[1] Section 501(b), 29 U.S.C. 791(b), as amended, provides:

> Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission [i.e., the Equal Employment Opportunity Commission] and to the Committee [i.e., the Intragency Committee on Employees who are Individuals with Disabilities] an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

bilitation Act, 29 U.S.C. 791, 794. He amended his complaint in June 1991 to assert the same causes of action with regard to his second application for advancement.[3] Pet. App. 4b-5b.

The district court granted summary judgment against petitioner on all claims. The court stated that, under the Tenth Circuit's decision in *Johnson* v. *United States Postal Service*, 861 F.2d 1475, 1477-1478 (1988), cert. denied, 493 U.S. 811 (1989), only Section 501 of the Act—and not Section 504—provides federal employees with a cause of action for violations of the Rehabilitation Act. See Pet. App. 9b-10b.

In 1992 amendments to this and other sections of the Rehabilitation Act, Congress replaced the terms "a handicap" and "handicaps" with "disability" and "disabilities." Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, Tit. I, §§ 102(f)(2) and (p)(29), 106 Stat. 4348, 4360. Except when referring to the findings of the courts below, which applied the unamended statute, this brief will employ the Act's amended language.

[2] Section 504(a), 29 U.S.C. 794(a), as amended (see § 102(p)(32), 106 Stat. 4360), provides in part:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

[3] In addition, petitioner alleged violations of the Postal Reorganization Act, 39 U.S.C. 1001(b), 1003(b), and claimed that the Service breached his employment contract and its implied covenant of good faith and fair dealing. *Reeder* v. *Frank*, 813 F. Supp. 773, 775 (D. Utah 1992). The district court granted summary judgment to the Postal Service on those claims, and petitioner did not pursue them in the court of appeals.

Turning to petitioner's Section 501 claim, the court held that petitioner was not entitled to relief under the Rehabilitation Act because he had failed to establish that he was an "individual with handicaps" under former 29 U.S.C. 706(8)(B).[4] Pet. App. 11b-25b. The court explained that, although petitioner's speech impairment was regarded as affecting a "major life activity," *id.* at 15b-17b & n.10, citing 29 C.F.R. 1613.702(c) (1991) (referring to, *inter alia*, "talking" and "working"), the evidence did not demonstrate that the limits on such activities were "substantial." See 29 U.S.C. 706(8)(B)(i). Petitioner had demonstrated his ability to speak intelligibly, and nothing in the record suggested that his impairment had adversely affected, or would adversely affect, his career advancement within the Postal Service. Pet. App. 16b n.11. The court also held that petitioner had failed to show that he had a "record" of an im-pairment that substantially limited one or more of his major life activities. See 29 U.S.C. 706(8)(B)(ii). Petitioner admitted that he had not consulted a physician since 1984 regarding his impairment, and his medical records did not show that he had ever been treated for it. Pet. App. 18b-20b. Finally, the court held that petitioner is not "regarded" as having a handicap, see 29 U.S.C. 706(8)(B)(iii). Pet. App. 20b. It noted that petitioner had never previously identified himself as suffering from a speech disorder. *Id.* at 17b-18b. Although petitioner had been denied a brief tele-communications assignment in 1989, in minor part be-cause of his difficulties in communicating, *id.* at 20b-21b, the court noted that this did not

[4] Subject to conditions not applicable here, an "individual with a disability" (formerly an "individual with handicaps") is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B).

suggest that he would be precluded from continuing or advancing in his normal course of employment. *Id.* at 23b; see also *id.* at 23b-25b.

3. The court of appeals affirmed in a brief unpublished opinion. Pet. App. 1a-3a. The court of appeals agreed, for substantially the reasons relied upon by the district court, that petitioner did not qualify as a handicapped person under the Rehabilitation Act, and thus lacked a viable cause of action under Section 501 of the Act. Pet. App. 3a. The court also declined petitioner's request that it reconsider circuit precedent holding that federal employees have no cause of action under Section 504. The court explained that, "because [petitioner's] [Section] 504 claim also requires an initial determination that [he] is handicapped," petitioner's contention that he has a claim under Section 504 is "moot." Pet. App. 3a.

ARGUMENT

Petitioner raises two issues, neither of which merits this Court's review. First, he claims that the courts below erred in finding that he did not qualify as a person with a disability under the Rehabilitation Act. That fact-bound issue was correctly resolved by the district court and court of appeals. Second, although the courts of appeals are divided on the question whether employees may sue federal agencies for violations of Section 504 of the Rehabilitation Act, there is no reason for the Court to resolve that conflict here. The issue is of little practical significance and, in any event, its resolution would not affect the outcome of this case.

1. There is no merit to petitioner's claim that the courts below erred in concluding that petitioner did not qualify as an "individual with a disability" (or, under the prior version of the Act, an "individual with handicaps") for purposes of the Rehabilitation Act. The Act defines a person with a disability as one who has "a physical * * *

impairment which substantially limits one or more of [his] major life activities," has a "record of such an impairment," or "is regarded as having such an impairment." 29 U.S.C. 706(8)(B). See note 4, *supra*. In support of his claim that he meets one or more of those criteria, petitioner cites his own deposition testimony, medical records, an affidavit of his supervisor, and "[i]nferences from the record" that, in his view, suggest that his speech impairment is the explanation for the Postal Service's failure to promote him. Pet. 40-43.

The district court fully considered petitioner's allegations and concluded that he failed to aver the specific facts needed to withstand a motion for summary judgment. See *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 888 (1990). With respect to whether petitioner's disability "substantially" limits any of his major life activities, the district court assessed petitioner's impairment in light of his apparent ability to communicate in his present position and in the course of these legal proceedings. See Pet. App. 16b n.11, 17b. The court also observed that petitioner's physician denied treating him for a speech impairment, and that his medical records stated only that his larynx problems were "associated with some difficulty in speech." *Id.* at 19b-20b. Moreover, although petitioner's supervisor acknowledged that his impairment was a "minor factor" in the decision to deny him a 30-day telecommunications detail involving intensive use of the telephone, *id.* at 20b-21b, petitioner failed to allege any relation between that detail and the duties of the position to which he sought to be promoted, see *id.* at 23b-24b. The court thus concluded that the record failed to show that petitioner was "likely to experience difficulty in securing or retaining benefits or in securing, or retaining, or advancing in employment," so as to be considered "substantially limited" in a major life activity. See 29 C.F.R. 32.3.

Because the district court correctly determined that there was not sufficient evidence from which a jury could conclude that petitioner satisfied the criteria for a handicapped person, see *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986), the court did not err in granting summary judgment against him. The court of appeals' affirmance of that ruling raises no issue of general importance warranting review by this Court.

2. Relying on its previous decision in *Johnson* v. *United States Postal Service*, 861 F.2d 1475, 1477 (10th Cir. 1988), cert. denied, 493 U.S. 811 (1989), the court of appeals rejected petitioner's contention that he was entitled to pursue a claim against the Postal Service under Section 504 of the Rehabilitation Act. Two other courts of appeals have agreed that Congress intended Section 501 to provide the exclusive remedy for federal employees under the Rehabilitation Act, and that federal employees may not sue under Section 504. See *Johnston* v. *Horne*, 875 F.2d 1415, 1420 (9th Cir. 1989); *McGuinness* v. *United States Postal Service*, 744 F.2d 1318, 1321 (7th Cir. 1984); see also *Milbert* v. *Koop*, 830 F.2d 354, 357 (D.C. Cir. 1987) ("strongly suggest[ing] that in the future, plaintiffs * * * seek relief under section 501 rather than under section 504"). Other courts of appeals, by contrast, have permitted federal employees to sue under Section 504. See *Doe* v. *Garrett*, 903 F.2d 1455, 1461 & n.10 (11th Cir. 1990); *Gardner* v. *Morris*, 752 F.2d 1271, 1277-1279 & n.7 (8th Cir. 1985); *Smith* v. *United States Postal Service*, 742 F.2d 257, 260-262 (6th Cir. 1984); *Prewitt* v. *United States Postal Service*, 662 F.2d 292 (5th Cir. 1981); see also *Clark* v. *Skinner*, 937 F.2d 123, 125 (4th Cir. 1991).

The language and structure of the Rehabilitation Act's remedial provisions support the Tenth Circuit's conclusion that federal employees may not sue under Section 504 of the Act. In Section 505(a)(1), 29 U.S.C.

794a(a)(1), the Act provides the same remedies for violations of Section 501 that are available to federal employees under Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c).[5] Since federal employees may sue the government under Section 717 of Title VII, they also may sue under Section 501 of the Rehabilitation Act. In contrast, the remedies for violations of Section 504 are specified in a separate provision of the Rehabilitation Act—Section 505(a)(2), 29 U.S.C. 794a(a)(2). Section 505(a)(2) states that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*] shall be available to any person aggrieved" by any act of any "recipient of Federal assistance or Federal provider of such assistance" under Section 504.

In ordinary usage, the category of "recipient[s] of Federal assistance or Federal provider[s] of such assistance" does not encompass the Postmaster General's direct federal employment (or other) functions. Moreover, Title VI of the Civil Rights Act of 1964 does not afford a remedy for discrimination in programs administered directly by the federal government, rather

---

[5] Section 505(a), 29 U.S.C. 794a(a) provides:

> (1) The remedies, procedures, and rights set forth in Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) shall be available, with respect to any complaint under [Section 501], to any employee or applicant for employment aggrieved by the final disposition of such compliant, or by the failure to take final action on such complaint. * * *
>
> (2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under [Section 504].

than through a state, local, or private intermediary. See *Soberal-Perez* v. *Heckler*, 717 F.2d 36, 38 (2d Cir. 1983) (Title VI applies only "where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary"), cert. denied, 466 U.S. 929 (1984). See also *United States Dep't of Transp.* v. *Paralyzed Veterans of America*, 477 U.S. 597, 605-606 (1986). Finally, the view that Section 504 provides no independent cause of action for federal employees finds support in Congress's decision to create separate remedial provisions for Section 501 and Section 504 claims. As Judge Posner observed in *McGuinness*, 744 F.2d at 1321, "it is unlikely that Congress, having specifically addressed employment of the handicapped by federal agencies (as distinct from employment by recipients, themselves nonfederal, of federal money) in section 501, would have done so again a few sections later in section 504." See also Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 Tex. L. Rev. 781, 785 n.18 (1989).

In any event, the question whether federal employees have a cause of action under Section 504 of the Rehabilitation Act as well as under Section 501 is of little practical significance, since there is no clear advantage to suing under Section 504.[6] Section 501 has

[6] Petitioner suggests (Pet. 65 n.10) that a Section 504 action would render him eligible for compensatory damages and a jury trial. However, with the exception of *Cortes* v. *Board of Governors*, 766 F. Supp. 623 (N.D. Ill. 1991), which did not discuss the defendant's status, none of the cases applying Section 504 to suits by an employee of the federal government has adopted those remedies. See also *Wood* v. *President & Trustees of Spring Hill College*, 978 F.2d 1214, 1219 n.9 (11th Cir. 1992) (persons proceeding under Section 504 against the federal government for employ-

long been read to impose an affirmative-action requirement upon federal employers that Section 504 omits, see *Southeastern Community College* v. *Davis*, 442 U.S. 397, 410-411 (1979), and both provisions were amended in 1992 to state identical standards for evaluating complaints alleging nonaffirmative-action employment discrimination. Compare 29 U.S.C. 791(g) with 29 U.S.C. 794(d).[7] Moreover, the courts that have permitted federal employees to sue under Section 504 have required employees to satisfy the same exhaustion requirements that are a prerequisite to suit under Section 501. See, *e.g.*, *Smith* v. *United States Postal Service*, 742 F.2d at 260-262; *Prewitt* v. *United States Postal Service*, 662 F.2d at 304.

---

ment discrimination may not recover compensatory or punitive damages).

[7] Section 791(g) of 29 U.S.C., which was added in 1992 (see § 503, 106 Stat. 4424), provides:

> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

The 1992 version of 29 U.S.C. 794(d) (see § 506, 106 Stat. 4428), provides:

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

In any event, this case is a particularly inappropriate vehicle for resolving the disagreement in the circuits concerning Section 504 claims, since a ruling in petitioner's favor on that issue would not alter the outcome. As the courts below correctly determined, petitioner is not eligible for relief under the Act because he does not qualify as an "individual with a disability." Thus, even if Section 504 provides a cause of action for federal employees, petitioner does not have a claim against the Postal Service because he does not come within the reach of the Act's substantive protections.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ROBERT V. ZENER
EDWARD T. SWAINE
Attorneys

JULY 1993

(3)

AUG 20 1993
OFFICE OF THE CLERK

Case No. 92-1788

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1993

IVAN C. REEDER,

Petitioner,

vs.

MARVIN T. RUNYON, POSTMASTER GENERAL
OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

David J. Holdsworth
Counsel of Record for Ivan C. Reeder,
Petitioner
ROMNEY & CONDIE
185 South State Street, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 321-7800

BEST AVAILABLE COPY

24 pp

QUESTIONS PRESENTED

1. Did the district court err in granting summary judgment against petitioner on the ground that his speech impairment was not substantially limiting so as to disqualify him from being an "individual with a disability" within the meaning of the Rehabilitation Act, 29 U.S.C. 706(8)(B), as amended.

2. Whether the district court erred in holding that petitioner did not have a cause of action against the Postal Service under Section 504 of the Rehabilitation Act, 29 U.S.C. 794.

TABLE OF CONTENTS

PETITIONER'S REPLY TO THE GOVERNMENT'S COMMENTS ON THE STATEMENT OF FACTS 1

PETITIONER'S REPLY TO THE GOVERNMENT'S ARGUMENT ON WHETHER REEDER CAN SATISFY THE TEST OF BEING A PERSON WITH A DISABILITY 9

HAVING AN IMPAIRMENT 10

HAVING A RECORD OF AN IMPAIRMENT . . . 11

BEING REGARDED AS HAVING AN IMPAIRMENT 13

CONCLUSION AS TO THE FIRST ISSUE . . . 15

REPLY TO THE GOVERNMENT'S ARGUMENT ON WHETHER §504 OF THE REHABILITATION ACT PROVIDES FOR A PRIVATE CAUSE OF ACTION 16

CONCLUSION AS TO THE SECOND ISSUE . . . 20

TABLE OF AUTHORITIES

Ciampa v. Massachusetts Rehabilitation Comm'n, 718 F.2d 1, 5 (1st Cir. 1983) . 17

Cortes v. Board of Governors, 766 F.2d 623 (N.D. Ill. 1991) 17

Doe v. District of Columbia, ____ F.Supp. ____, 59 FEP 363, 59 EPD 41656 (D.D.C. 1992) 17

Franklin v. Gwinnett County Public Schools, 503 U.S. ____, 112 S.Ct. 1028, 1035, 117 L.Ed 2d 208 (1992) 19

Lengen v. Dept. of Transportation, 903 F.2d 1464 (3rd Cir. 1990) 18

Miener v. Missouri, 673 F.2d 969, 973 (8th Cir. 1982), cert. denied, 459 U.S. 909, 103 S.Ct. 215, 74 L.Ed 2d 171 (1982) . . . 17

Nelson v. Thornburgh, 567 F.Supp. 369 (E.D. Pa. 1983), affirmed w/o opinion, 732 F.2d 147 (3rd Cir. 1984), cert. denied, 469 U.S. 1188, 105 S.Ct. 955, 83 L.Ed 2d 962 (1985) 17

School Board of Nassau County v. Arline, 480 U.S. 273, 281, 107 S.Ct. 1123, 1127 (1987) . 12, 14

Smith v. Barton, 914 F.2d 1330, 1337 (9th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 2825 (1991) 17

Tanberg v. Weld County Sheriff, 787 F. Supp. 970 (Colo. 1992) 17

Wood v. Trustees of Spring Hill Cottage, 978 F.2d 1214, 1219 (11th Cir. 1992) . 18

PETITIONER'S REPLY TO THE GOVERNMENT'S COMMENTS ON THE STATEMENT OF FACTS

Reeder's opening brief and the government's opposition brief may have created a few areas of confusion as to the facts of this case.

1. There may be some confusion regarding Reeder's employment record with the Postal Service. In Reeder's opening brief, Reeder noted that he began employment with the Postal Service in 1973 and progressed in that employment until 1981. (Pet. brief, page 17).

In the government's opposition brief, in paragraph #1 of its "Statement" [of Facts], the government has tried to put a little different spin on Reeder's employment record by stating, as a fact, that Reeder received several promotions and advanced to a management position having supervisory responsibilities. (Resp. brief, page 2).

The government wants the Court to assume that Reeder has in fact received several promotions and that because Reeder has

received these several promotions and now supervises other employees, he must be able to speak with little problem, and, therefore, his impairment cannot be deemed substantially limiting. This would be an improper inference.

Reeder began employment with the Postal Service in 1973 as a Distribution Clerk. That job had a GS (PS) grade of 5. In 1974, he transferred to the position of Custodial Laborer and as a result of such transfer was required to be reduced in grade to a PS-3. In 1975, he received one of his two promotions - he was promoted from the Custodial Laborer's position of PS-3 to a Clerk's position of PS-5. This was the grade he had when he had first become employed.

In 1979, his grade level was unilaterally upgraded to a PS-6 and the title changed from Clerk to Technician. In 1981, he received the second of his promotions; he was promoted to the position of Maintenance Control Supervisor, from a PS-6 to a PS-14,

an entry level for a postal supervisor. Thus, in nineteen years, Reeder has actually been promoted only twice and only one promotion was a true advancement. There have not been "several" promotions. Reeder has not advanced in employment since 1981.

In the position of Maintenance Control Supervisor, Reeder does supervise several employees.

Reeder testified in his deposition: "I'm in a situation that I have eight people who I've taught to practically read lips, to take non-verbal messages and act on them" and "my type of supervision is to teach my employees how to do everything I do; everything, which means taking my telephone calls too". (Dep. at 182, 187). Reeder himself has made accommodations to enable him to perform his job:

> Q. Okay. So are you saying, to paraphrase you, that the office informally adjusts to the situation, as opposed to taking -- like sending out a memo or directive saying "From here on out Ivan is not going to be speaking; he'll do the administrative

functions," the office just sort of naturally adapts? Is that what you're saying?
A. Yes. (Dep. at 190-191.)

There is no inconsistency between Reeder's record of being able to supervise others and his claims of a substantial limitation on his ability to speak and to advance.

2. There may be some confusion regarding the history of Reeder's speech impairment and his efforts to seek medical treatment thereof. In Reeder's opening brief, he summarized his search for a cure. (Pet. brief at pages 19-21). In the government's opposition brief, in paragraph #2 of its "Statement" [of Facts], the government discusses how the district court analyzed a few selected parts of Reeder's evidence as to his life with his impairment. (Resp. brief at 4).

But describing in the "Facts" section of the opposition brief what the district court did may cause misimpressions. The government wants the Court to assume or conclude that

because Reeder is not currently receiving treatment for his impairment, he didn't receive any treatment in the past. This would be an improper inference.

In his deposition (and in his earlier briefs), Reeder acknowledged that he was no longer actively seeking medical treatment for his condition and explained why. Reeder testified that after surgeries did not prove successful, he began a treatment of injections into his voicebox over a two year period in the early 1980's.

> Apparently he [the doctor performing the injections] had taken some special training and a new procedure was to inject the vocal cords. One of the reasons that I quit seeing him was that first, this injection process is uncomfortable. What they do is take a serum - its a poison, its called botulin which comes from the virus botulism ... They inject it externally and hope that you hit the vocal cord. (Dep. at 164.)

Reeder testified this treatment only worked for a few hours at a time and that sometimes the doctor would miss a vocal cord and the

toxin would go down the esophagus and cause nausea. (Dep. at 164, 165.)

Reeder discontinued this treatment out of pain and frustration, not because it was no longer necessary.

> A. His next procedure was to disconnect the nerves from one vocal cord, in effect doing what the shots would do, except it's permanent.
>
> Q. Okay.
>
> A. That made me think: Well, if it's come to this, I don't want to have to go through this the rest of my life, and if this is the only advancement that they have in this specialty, I'll just suffer through and hope something else comes along which could help it. (Dep. at 165 (emphasis added)).

After reaching that conclusion, Reeder has visited a Dr. Aldrich for general medical problems. But Dr. Aldrich has not treated him specifically for his speech impairment although the medical records (see Pet. brief at page 20) reference the problem and confirm his testimony as to his surgeries.

Such evidence and reasonable inferences to be drawn therefrom establish he had a difficult to analyze impairment which had

necessitated extensive medical testing and treatment.

When asked during his deposition whether he had any medical records, Reeder explained that he may not have kept any medical records but did have billings and cancelled checks. (Dep. at 155.)

Following his deposition, Reeder was requested to furnish medical records (not the billings and checks) either by obtaining the records himself and forwarding them to the Postal Service or by signing releases and forwarding said releases to the Postal Service so that the Postal Service could seek to obtain records by contacting the doctors.

Reeder signed the releases and sent them to the Postal Service. In its district court brief, the Postal Service included only the records of Reeder's most recent general practitioner, Dr. Aldrich, which Reeder stipulated had not even treated him for his speech. Yet, Dr. Aldrich noted the impairment, described it as a "laryngeal

spasm" and confirmed that Reeder had had surgery and that Reeder's voice suffers under fatigue and stress.

3. There may be some confusion regarding the relationship between the temporary assignment ("a detail") Reeder was denied and the position for which he was twice rejected.

The detail in question was a temporary assignment but it involved the same duties as the very position for which Reeder was applying. The person who received the detail later received the promotion. The two opportunities were closely connected.[1]

---

[1]Management's reason for the denial of the detail could be viewed as precluding Reeder from advancing:

> A. He [the person selected] was there for the promotion. He's been up there since.
>
> ***
>
> A. The reason I went to him [Reeder's immediate supervisor] is to find out if Dierks had received a promotion or a detail.
>
> Q. Or a detail? Is that what you said, a promotion or a detail?
>
> A. Yes.
>
> Q. Okay. And then told you that he had gotten a detail at that

PETITIONER'S REPLY TO THE GOVERNMENT'S ARGUMENT ON WHETHER REEDER CAN SATISFY THE TEST OF BEING A PERSON WITH A DISABILITY

With respect to the issue of whether Plaintiff's impairment is substantially limiting to a major life activity so as to qualify him as a person with a disability under the Rehabilitation Act, 29 U.S.C. §706(8)(B), the government explains what the district court did and asserts repeatedly that the district court concluded "correctly" that Reeder had failed to aver the specific facts needed to withstand a motion for summary judgment. Beyond that, the government does little to respond to Reeder's arguments.

> point or a promotion or both?
>
> A. Yes. He told me that it was a detail, but his conversation led me to believe that it was a promotion.
>
> ***
>
> A. The impression was that the topic of the meetings was not a detail but it was the promotion. (Dep. at 193, 203, 204 and 205.)

HAVING AN IMPAIRMENT

a. With respect to the issue of "having" a substantially limiting actual impairment, Reeder's argument is that the district court virtually ignored the content of Reeder's deposition (that, for example, Reeder had difficulty getting people to understand him 90% of the time) and instead assumed that if Reeder could speak intelligibly in a deposition, he couldn't have a substantially limiting impairment.

The government accepts this assumption without question. This is a mistake.

A substantial limitation is a limitation, not total inability. A person who is substantially limited may still be able, through a variety of means, to perform successfully all of his major life activities, including speaking in a deposition, but such does not negate his right to coverage under the Rehabilitation Act. A deaf person wearing a hearing aid might be able to participate "normally" in a

deposition but would still be a person with a disability.

Reeder's act of participating in a deposition shouldn't ipso facto preclude his efforts to bring himself under the protection of the Rehabilitation Act.

HAVING A RECORD OF AN IMPAIRMENT

With respect to the issue of having "a record of" a substantially limiting impairment, Reeder's argument is that the district court virtually ignored Reeder's uncontradicted deposition testimony and his responses to discovery requests as to his lengthy and varied history of treatment of his impairment, including two surgeries, two years of injections, and his decision to give up searching for a cure, and instead assumed that if Reeder had not been treated recently for the impairment, as evidenced by some medically documented record, he must, therefore, not have been treated in the past for such an impairment.

The government accepts this assumption wholesale. This is a mistake.

The government equates "having a record of" with having medical records of. One may establish a history of having an impairment in several ways, only one of which is by producing "records".[2]

The Rehabilitation Act doesn't require a plaintiff to obtain and maintain a complete copy of all of his medical records to establish his eligibility. The plaintiff must only produce credible evidence that he has a history of a substantially limiting impairment.[3]

---

[2]The regulations define the phrase "has a record of such impairment" as one who "has a history of, or has been misclassified" as having a mental or physical impairment that substantially limits one or more major life activities. 29 C.F.R. § 1613.702.

[3]The government's cursory analysis of the "record of" test conflicts with School Board of Nassau County v. Arline, 480 U.S. 273, 281, 107 S.Ct. 1123, 1127 (1987), wherein the Court held that Arline's:

> "impairment [tuberculosis] was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities

Reeder's evidence was sufficient to establish a fact question as whether he had a substantially limiting impairment in the past.

BEING REGARDED AS HAVING AN IMPAIRMENT

With respect to the issue of "being regarded as" having a handicap, Reeder's argument is that because the Postal Service refused to grant Reeder a detail to a position, in part because of the employer's concern about Reeder's ability to speak, a factfinder could reasonably conclude that the employer perceived his impairment as severely limiting his ability to perform in any positions which included a significant amount of speaking and that because advanced positions in the maintenance field would involve significant speaking, he would be prevented from advancing.

---

were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of impairment" within the meaning of 29 U.S.C. § 706(7)(B)(ii).

The government argues that the reason the Postal Service denied Reeder the temporary assignment would not or did not carry over into its decision to deny Reeder the permanent assignment. That is a mistake.

Here, Reeder was denied the detail which lead to the promotion because of a perception (not reality) that he could not speak adequately in any capacity, whether by the phone or otherwise. That is exactly the kind of thought process targeted for elimination in School Board v. Arline, 480 U.S. 273, 284, 107 S.Ct. 1123, 1128 (1987).

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

Reeder's impairment was viewed as limiting him not just in his ability to do one particular job with one particular

employer, but in his ability to communicate in any higher level jobs, virtually precluding his advancement.

CONCLUSION AS TO THE FIRST ISSUE

Petitioner averred specific facts needed to raise a genuine issue of material fact as to the substantiality of his impairment. Indeed, it is difficult to see how he could be more specific in his deposition as to how his impairment limited his work dealings: his coworkers have difficulty understanding him "every day at work", he has trouble communicating "about 90% of the time", or how he could be more specific as to his various surgeries, the two years of injections into his voice box, his reasons for giving up hope of finding a cure, or how he could be more specific as to the relationship between the detail he was denied because of his speech and the permanent position he was seeking.

There was sufficient evidence from which a jury could conclude that Reeder satisfied at least one of the tests of being a person

with a handicap. Certainly, the evidence raised a genuine question of fact and summary judgment was improper.

REPLY TO THE GOVERNMENT'S ARGUMENT ON WHETHER §504 OF THE REHABILITATION ACT PROVIDES FOR A PRIVATE CAUSE OF ACTION

With respect to the issue of whether federal (and Postal Service) employees have rights under Section 504 of the Rehabilitation Act (29 U.S.C. §794) and may sue federal agencies under §504 for violations of those rights, the government argues that the issue is of little practical significance because "there is no clear advantage to suing under Section 504." (Resp. brief at 9)

Reeder concedes the "advantage" may not be clear, but the advantage may be very significant to this Plaintiff and any federal employee plaintiff. The advantage plaintiff seeks is to recover compensatory damages.

A growing number of lower courts have held that a plaintiff who sues under §504 may be able to recover compensatory damages and

by logical extension have a jury trial.[4] Recent cases include Cortes v. Board of Governors, 766 F.2d 623 (N.D. Ill. 1991); Tanberg v. Weld County Sheriff, 787 F. Supp. 970 (Colo. 1992); Doe v. District of Columbia, ____ F.Supp. ____, 59 FEP 363, (D.D.C. 1992).

The government argues that, with the exception of Cortes v. Board of Governors, none of the cases in this developing line have interpreted §504 to permit federal employees suing the federal government to seek compensatory damages.

That may be the case. But it is the case only because the trend is so recent, not because courts have affirmatively decided

---

[4]Earlier cases include Miener v. Missouri, 673 F.2d 969, 973 (8th Cir. 1982), cert. denied, 459 U.S. 909, 103 S.Ct. 215, 74 L.Ed 2d 171 (1982); Ciampa v. Massachusetts Rehabilitation Comm'n, 718 F.2d 1, 5 (1st Cir. 1983); Nelson v. Thornburgh, 567 F.Supp. 369 (E.D. Pa. 1983), affirmed w/o opinion, 732 F.2d 147 (3rd Cir. 1984), cert. denied, 469 U.S. 1188, 105 S.Ct. 955, 83 L.Ed 2d 962 (1985). See specifically Smith v. Barton, 914 F.2d 1330, 1337 (9th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 2825 (1991).

against extending the law to apply to the federal government. The path may not be well traveled, but at least it's in the right forest.[5]

---

[5] Resort to Wood v. Trustees of Spring Hill Cottage, 978 F.2d 1214, 1219 (11th Cir. 1992), as authority is full of problems. In Lengen v. Dept. of Transportation, 903 F.2d 1464 (3rd Cir. 1990), which the 11th Circuit cites as its precedent for Wood, the 11th Circuit did not even reach the issue of whether a federal employee had a private right of action against the federal government under §504. Indeed, the Wood court expressly limited the holding in Lengen to actions under §501 (29 U.S.C. §791) for which compensatory damages are not available, or at least were not available at the time. More importantly, the Wood case didn't involve the federal government as a defendant. Had Ms. Wood been a federal employee and sued the federal government for compensatory damages under §504, the 11th Cir. may very well have found compensatory damages were permissible on a showing of intentional discrimination. See Wood at 1219-1220:

> This Circuit has held that plaintiffs who proceed under a theory of disparate treatment in Section 504 actions must prove intentional discrimination or bad faith in order to recover compensatory damages... In addition, controlling precedent on Title VI remedies, made applicable to section 504 actions under the Rehabilitation Act, indicates that compensatory damages ... are permissible on a showing of intentional discrimination.

In any event, while there may have been resistance in the past to recognizing a cause of action in federal employees under §504 or permitting compensatory damages against the federal government, such resistance is now on very thin ice by virtue of the Court's decision in Franklin v. Gwinnett County Public Schools, 503 U.S. ____, 112 S.Ct. 1028, 1035, 117 L.Ed 2d 208 (1992).

If the Court follows Franklin, the Court should determine that §504 does not specify the relief obtainable and that Congress has not expressly (or otherwise) disallowed compensatory damages under §504.

Thus, if, as Reeder argues, Reeder has a right under §504 to sue the Postal Service for the discrimination alleged, he should be able to recover compensatory damages. See Franklin, 112 S.Ct. at 1035:

> Absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable

cause of action brought pursuant to a federal statute.

Applying §504 to suits by an employee of the federal government and permitting recovery of compensatory damages may just be a matter of the proper post-Franklin federal employment case reaching the Court. This is such a case.[6]

CONCLUSION AS TO THE SECOND ISSUE

If the Court determines that Reeder does raise a genuine fact question as to the

---

[6] Permitting recovery of compensatory damages under §504 as against the federal government is in harmony with Congress' action in passing the Civil Rights Act of 1991. The passage of the Civil Rights Act of 1991, however, requires Petitioner to concede that because the language of §501 of the Rehabilitation Act (which incorporates the procedures and remedies of Title VII), now probably incorporates the amendments made to Title VII by the Civil Rights Act of 1991, §501 now probably provides plaintiffs with an avenue to recover compensatory damages. Thus, whether Reeder needs to resort to §504 to seek compensatory damages depends on whether the 1991 Act changes are to be applied retroactively. Only if the Court determines the 1991 Act is not to be applied retroactively, will the issue of whether §504 provides a cause of action for compensatory damages have continuing significance.

substantiality of his impairment so as to come within the protection of the Act, the Court should resolve the conflicts between the Circuits as to §504 of the Rehabilitation Act. The petition for writ of certiorari should be granted.

Respectfully submitted this 20th day of August, 1993.

David J. Holdsworth
Counsel of Record for
Ivan C. Reeder, Petitioner
ROMNEY & CONDIE
185 South State Street, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 321-7800

djh2472